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No. 108, Original

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

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STATE OF NEBRASKA,  
*Plaintiff,*  
v.

STATE OF WYOMING, *et al.,*  
*Defendants.*

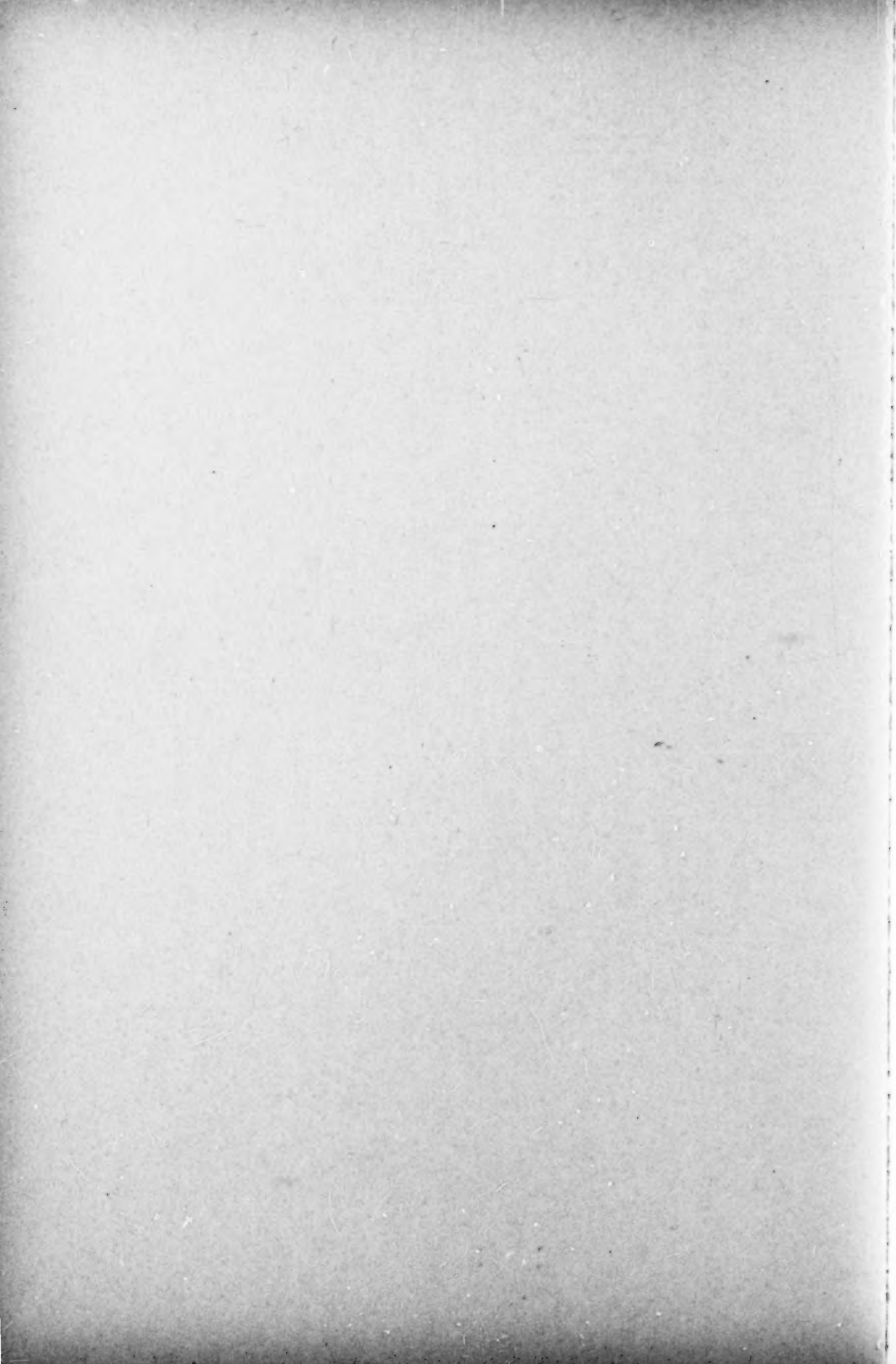
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OWEN OLPIN, SPECIAL MASTER  
THIRD INTERIM REPORT  
ON MOTIONS TO AMEND THE PLEADINGS

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September 9, 1994

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## GLOSSARY OF SELECTED TERMS

An "*acre foot*" is that quantity of water that will cover an acre of land to the depth of one foot. It is the equivalent of 43,560 cubic feet. It is common to refer to a right to a specified number of acre feet in a water year or during an irrigation season.

One "*second foot*" of water equals 1.98 acre feet of water per day and 722.7 acre feet per year.

A "*call*" is a demand made by or on behalf of senior water appropriators requiring the holders of more junior appropriation rights to refrain from diverting and using water until the senior's prior rights have been met.

There will be many references to the priorities, requirements, and supplies of "*canals*." In such instances the word "*canal*" is used as representative of the lands under or served by the canal.

"*Consumptive use*" refers to the water lost by evaporation and transpiration in the course of diversion and use. It is represented by the difference between the water diverted and that which returns to the stream.

"*Instream use*" refers to nondiversionary use by leaving water in the stream to support wildlife, recreational and other values served by the natural stream environment.

"*Irrigation requirement*" is the quantity of water (including unavoidable waste), exclusive of precipitation, that is required for crop production.

"*Irrigation season*" is used in this Report, as defined in the decree, to include the months of May through September during which irrigation deliveries are made to lands in the North Platte Basin.

"*Natural flow*" or "*direct flow*" refers to all water in a stream except that which comes from storage water releases.

The western law of "*prior appropriation*" is the body of water law adopted widely by arid western states, including Colorado, Wyoming and Nebraska, under which water rights are administered on a priority of appropriation basis with senior water rights holders being entitled to receive their entire requirements before more junior rights come into priority.

"*Return flow*" is the residual which returns to a stream of water which has been diverted and used. It may be "visible" or "invisible" depending upon whether it takes the form of surface flows or underground percolation.

"*Second foot*" is an abbreviated expression for "one cubic foot per second of time." It is a unit of measurement of the flow of water.

The term "*storage water*", as applied to releases from reservoirs owned and operated by the United States, is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree.

"*Water year*" as used herein means the twelve months between and including October 1 of each year and September 30 of the following year. This is the water year of Nebraska, Wyoming and Colorado, and is the standard water year employed by the United States Geological Survey.

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**September 9, 1994**

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**I. OVERVIEW OF THE CASE**

This interstate water controversy first came before the Supreme Court in October, 1934, when the State of Nebraska filed a bill against the State of Wyoming alleging violations of the western water law rules of priority of appropriation on the North Platte River. The State of Colorado was impleaded as a defendant, and in 1938 the United States was granted leave to intervene.<sup>1</sup> Sixty years later, these four parties are again before the Court in a renewed effort to sort out their competing claims to North Platte waters.

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<sup>1</sup> That earlier case is referred to in this Third Interim Report as "the original proceedings."

The original proceedings concluded in 1945 when the Court, after nearly a decade of litigation before Special Master Michael J. Doherty, issued an opinion and a decree equitably apportioning the waters of the stream.<sup>2</sup> The polestar of the decree is its proportionate allocation of natural flows during the irrigation season in the "pivotal" reach of the North Platte between the Guernsey Reservoir and Dam in Wyoming, approximately forty miles upstream of the Wyoming-Nebraska state line, and the Tri-State Diversion Dam in Nebraska, approximately one mile downstream of the state line. Paragraph V of the decree apportions seventy-five percent of the natural flow in that reach to Nebraska and twenty-five percent to Wyoming. The Court expressly retained jurisdiction at the foot of the decree in order to respond to changed circumstances.<sup>3</sup>

On October 7, 1986, Nebraska petitioned the Court under the reopener clause to enforce the decree and for injunctive relief.<sup>4</sup> Seeking redress for alleged "current and threatened harm to [her] apportionment pursuant to the terms of the Decree,"<sup>5</sup> Nebraska invoked, among other

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<sup>2</sup> *Nebraska v. Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953) (the "original opinion" and the "decree").

<sup>3</sup> Paragraph XIII of the decree (the "reopener clause") states in part:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

*Nebraska v. Wyoming*, 325 U.S. at 671.

<sup>4</sup> Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Neb. 1986 Pet.") (Docket Item No. 1). References to the docket items of this original record are included in footnotes.

<sup>5</sup> Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Neb. 1986 Br. in Support") at 4 (Docket Item No. 1).

provisions, Subparagraph XIII(c) of the reopener clause which contemplated possible future relief on "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." The Court on January 20, 1987, granted Nebraska leave to file her 1986 petition challenging proposed water development projects on Wyoming tributaries, including the Laramie River and Deer Creek, both of which have historically contributed significant flows to the pivotal reach.<sup>6</sup> Nebraska also pleaded an issue concerning the storage priority of four reservoirs in Nebraska known as the Inland Lakes that has since been resolved by the Court in her favor and in favor of the United States.<sup>7</sup>

Wyoming filed her answer and counterclaim on March 18, 1987,<sup>8</sup> which the Court accepted for filing on April 20, 1987.<sup>9</sup> Wyoming's counterclaim alleged that Nebraska

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<sup>6</sup> *Nebraska v. Wyoming*, 479 U.S. 1051 (1987).

<sup>7</sup> On April 20, 1993, the Court held that the decree authorizes the federal Bureau of Reclamation to continue its longstanding diversion and storage practices in the Inland Lakes, four off-channel reservoirs in Nebraska, served by the Interstate Canal which diverts from the mainstem at the Whalen Diversion Dam in Wyoming. The Court determined that the Inland Lakes share the December 6, 1904 priority date of the original components of the Bureau's North Platte Project. Pursuant to that priority, the Bureau may divert and store 46,000 acre feet of water in the Inland Lakes during the non-irrigation season. Inland Lakes storage water may be temporarily stored in the Guernsey and Glendo Reservoirs for later delivery to the Inland Lakes. *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1697 (1993). The Inland Lakes issue itself is now out of the case, although Wyoming's administration, under state law, of the Inland Lakes priority relative to the priority of the proposed Deer Creek Project remains as a possible issue to be resolved in this case.

<sup>8</sup> Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim (Mar. 18, 1987) (respectively, "Wyo. 1987 Answer," "Wyo. 1987 Counterclaim") (Docket Item No. 5).

<sup>9</sup> *Nebraska v. Wyoming*, 481 U.S. 1011 (1987).



is circumventing the decree by demanding and diverting water from irrigation canals at and above the Tri-State Dam in excess of the "present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree"<sup>10</sup> and by demanding natural flow and storage water from sources above Tri-State Dam and diverting it for unrecognized and unauthorized uses below Tri-State Dam. The latter claim is based upon the Court's determination in 1945 that Nebraska's canals diverting downstream of Tri-State Dam were adequately served by return flows and other local supplies and, therefore, were not entitled to call on upstream flows from Colorado and Wyoming for irrigation uses. Wyoming also alleged that Nebraska was using Glendo Reservoir storage water for non-irrigation uses and uses outside the North Platte Basin in western Nebraska.<sup>11</sup>

Following years of extensive discovery and motions on various matters, including two rounds of summary judgment motions,<sup>12</sup> the Court in 1993 issued its opinion

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<sup>10</sup> Wyo. 1987 Counterclaim at 8 (Docket Item No. 5).

<sup>11</sup> *Id.* at 8-9.

<sup>12</sup> The procedural history of the case is set forth in more detail below. *See infra* pp. 20-33. I have filed two previous interim reports.

On June 16, 1989, I filed my First Interim Report recommending that five pending motions for intervention be denied and that Wyoming's September 11, 1987 motion for summary judgment on the issues in the case be denied without prejudice. First Interim Report of Special Master (June 14, 1989) ("First Interim Report") (Docket Item No. 140). The Court received and filed the report without inviting exceptions at that time. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

I filed my Second Interim Report on April 9, 1992, recommending that the Court: (i) deny all of the renewed motions for intervention; (ii) grant summary judgment for the United States and Nebraska that the Inland Lakes have the same December 6, 1904, priority date as the other original components of the Bureau of Reclamation's North Platte Project to divert 46,000 acre feet of storage water to the Inland Lakes during the non-irrigation season, with temporary storage in Guernsey and Glendo Reservoirs; (iii)



eliminating two issues from the case,<sup>13</sup> explicating the remaining issues, setting forth the standards for the exercise of its original jurisdiction in this case and the standards for securing relief, enforcing or modifying rights under the decree, and describing the scope of these proceedings.

Further discovery and an exercise undertaken at my request, during which Nebraska prepared a memorandum concerning Wyoming's present and proposed developments on the Laramie River<sup>14</sup> and Wyoming prepared a memo-

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grant judgment for Nebraska that, under Paragraph V of the decree, Nebraska is free to allocate her share of the North Platte waters as she sees fit, and that while Paragraph IV limits the extent to which Nebraska canals diverting from the mainstem may prevent federal reservoirs from storing water in Wyoming, that paragraph does not restrict the actual quantities of water those canals can ultimately divert; and (iv) deny all other motions for summary judgment. The Court overruled the parties' exceptions to the First and Second Interim Reports. *Nebraska v. Wyoming*, 113 S. Ct. at 1689, 1701.

<sup>13</sup> The Inland Lakes issue was resolved by the 1993 opinion. See *supra* note 7. The Court also ruled that paragraph V of the decree does not impose absolute ceilings on diversions by Nebraska canals taking from the pivotal reach. The Court held that, under Paragraph V, "Nebraska is free to allocate its share among its canals as it sees fit." *Nebraska v. Wyoming*, 113 S. Ct. at 1701. The Court also held that Paragraph IV does not restrict the actual quantities of water the Nebraska canals may divert under the decree; it simply limits the extent to which Nebraska canals diverting in the mainstem may prevent federal reservoirs from storing water in Wyoming under the junior Wyoming priorities of those reservoirs. *Id.* at 1700.

<sup>14</sup> Nebraska's Memorandum on the Status of the Laramie River Claims (Nov. 12, 1993) ("Neb. Laramie Memo.") (Docket Item No. 591). Nebraska described and developed her injury claims respecting proposed Wyoming developments on the Laramie, including the proposed Corn Creek Irrigation Project (a surface water diversion system, a pump station, a low water diversion weir, a 15,000 acre foot reservoir and a water distribution pipeline) (*id.* at 22-26); the Goshen Irrigation District's new diversion from the Laramie (new permanent higher capacity pumps to re-

randum describing her present and intended administration of water rights in the North Platte Basin,<sup>15</sup> led to the current petitions filed by Nebraska and Wyoming on February 18, 1994 proposing amendments to the pleadings.

On March 21, 1994, the Court referred the petitions of both states to me for my recommendations.<sup>16</sup> If Nebraska's petition is granted, her amended pleadings would supersede and replace her original 1986 pleadings and also the amendments proposed by Nebraska in 1991, which the Court earlier referred to me.<sup>17</sup> Similarly, Wyoming's proposed amended pleadings, if granted, would replace her 1987 counterclaim. The amendments proposed by the two states address additional concerns that have arisen as a result of the Court's 1993 opinion and

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place a low capacity pump) (*id.* at 26-35); groundwater development on the Laramie (a table provided by Nebraska suggests that from 1945 to 1992, acreage irrigated by groundwater increased from 12 acres to 6,749 acres) (*id.* at 36); and several water projects on the Laramie (*id.* at 40-44).

<sup>15</sup> Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (Sept. 17, 1993) (Wyo. Water Admin. Memo.") (Docket Item No. 565).

<sup>16</sup> *Nebraska v. Wyoming*, 114 S. Ct. 1290 (1994). By that order the Court granted Nebraska's and Wyoming's joint motion requesting that their proposed pleading amendments be filed with me for my recommendations. See Nebraska's and Wyoming's Joint Motion to Refer Motions for Leave to File Amended Pleadings to the Special Master for His Recommendation (Feb. 18, 1994) (Docket Item No. 625). The United States filed a brief stating that it did not oppose the Nebraska and Wyoming joint motion to refer even though it did have "serious reservations about the proposed amended pleadings to the extent they would lead to unnecessary or open-ended expansion of this litigation." Brief for the United States on Joint Motion by Nebraska and Wyoming to Refer to Special Master Their Motions for Leave to File Amended Pleadings (Mar. 16, 1994) ("Brief for the United States") at 9 (Docket Item No. 628).

<sup>17</sup> *Nebraska v. Wyoming*, 113 S. Ct. 1689 (1993).

as a result of discovery and learning in the case to date. The Court's ruling on the proposed amendments will shape the issues for final trial preparation.

As with the 1986 Nebraska and 1987 Wyoming petitions for leave to file, the 1994 petitions have been fully briefed, this time initially before me in accordance with the Court's referral. The briefs, transcripts of proceedings, and other materials in the record that are now before the Court enable the Court to dispose of the petitions whether or not the Court agrees with my recommendations.<sup>18</sup> Following a complete round of briefing and supplemental briefing on the important groundwater pumping issue, I held a two-day hearing in Denver, Colorado on July 26 and 27, 1994.<sup>19</sup> Prior to that hearing I advised the parties and *amici* of my tentative recommendations,<sup>20</sup> and they were afforded full opportunity during the hearing to contest or support those tentative recommendations. In view of the full opportunity that has been afforded to respond to my recommendations and the full written record that is available to the Court, I respectfully suggest, in the interest of expedition, that the Court consider disposing of the Nebraska and Wyoming petitions without calling for exceptions.

Both in 1945, when the Court set forth the test for taking jurisdiction in the original proceedings,<sup>21</sup> and in 1993 when the Court set forth its interpretation of the

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<sup>18</sup> The Court did not hold a hearing in 1987 on whether to grant leave to file the initial pleadings in the case.

<sup>19</sup> July 26, 1994 Transcript and July 27, 1994 Transcript (Docket Item No. 688).

<sup>20</sup> Fourteenth Memorandum of Special Master *attached to memorandum from Saône B. Crocker, Assistant to Special Master, to Distribution List* (July 12, 1994) (Docket Item No. 677).

<sup>21</sup> That test is essentially whether the demands on the stream exceed the supply, that is whether it is overappropriated. *Nebraska v. Wyoming*, 325 U.S. at 610.

scope of the 1986 and 1987 pleadings,<sup>22</sup> the Court established the basis for taking jurisdiction of the North Platte controversies. Consonant with those foundations, I am recommending in this report that the Court largely grant the motions of both Nebraska and Wyoming to amend the pleadings with two major exceptions which are discussed at length below.

The decree presaged a period of more than forty years during which none of the parties came back to the Court to complain. It has become apparent during the current proceedings that the alleged problems caused by changed conditions on the North Platte, and especially by increasing demands from a greater array of interests, have greatly magnified the complexity of the controversies. I have, therefore, come to appreciate that the scope of issues addressed in this proceeding must be broader than those considered between 1934 and 1945 and even those specifically spelled out in the 1986 and 1987 pleadings. A broader scope now will afford greater prospects for another long litigation-free period.

## II. HISTORY OF THE CASE

### A. The Original Proceedings

During the original proceedings, the issues that the litigating states and the United States put before the Court involved mainly competing irrigation uses,<sup>23</sup> and

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<sup>22</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1695. The parties may seek both to enforce and modify the decree, although the standards of proof differ.

<sup>23</sup> During the original proceedings, Special Master Doherty noted the critical need of irrigation to agriculture in Colorado, Wyoming and western Nebraska:

Generally speaking, it may be said that the entire North Platte basin in Colorado and Wyoming is strictly arid, so that no considerable agriculture is possible without irrigation. Nebraska, on the other hand, from west to east along the North Platte and Platte Rivers, divides roughly into three zones, the

the decree, accordingly, centers on the irrigation season from May 1st to September 30th each year.<sup>24</sup> Municipal and industrial uses were secondary, and, since none of the now highly relevant federal environmental laws were in effect at that time, the important wildlife resources in the Big Bend reach in central Nebraska were entirely unaccounted for.<sup>25</sup> Relative to irrigation, other uses have become more significant since 1945, including wildlife habitat, water-cooled electric power production, and municipal, industrial and recreational uses.

The Court in 1945 expressly selected the principle of proportionate allocation as the basis for the equitable apportionment of the North Platte's natural flows in the pivotal reach, and it allocated those flows seventy-five percent to Nebraska and twenty-five percent to Wyoming.

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western third being arid to semi-arid, where irrigation is indispensable to the type of agriculture carried on, the middle third being sub-humid, where some crops can be raised with reasonable success without irrigation, but where lack of irrigation would seriously limit diversification, and the eastern third, which is sufficiently humid to render irrigation economically unjustified. . . . These belts or zones tend to move eastward in dry periods and westwards in wet cycles.

Report of the Honorable Michael J. Doherty, Special Master (1944) ("Doherty Report") at 26.

<sup>24</sup> There are some exceptions to the irrigation season focus, including, but not limited to: year around limitations in the stream's high mountain reaches constraining Colorado (decree Paragraph I), and Wyoming (decree Paragraph II). Decree Paragraph I(c) also enjoins Colorado from exporting more than 60,000 acre feet of water out of the North Platte basin in any consecutive ten-year period. Storage also takes place in the Inland Lakes in Nebraska during the off-irrigation season.

<sup>25</sup> There are over 200 species of birds that live or migrate in the Central Platte valley. It has over fifty mammals in its habitat, about a dozen amphibians and reptiles and over sixty species of fish in the river. In addition, the flood plain supports a wide variety of trees, shrubs, vines, grasses, sedges and herbs, many of which rely on the wetlands and prairie areas in the basin. See Paul A. Johnsgard, *The Platte: Channels In Time* 97-139 (1984).



The method of proportionate allocation was recommended by Special Master Doherty, and the Court adopted the Master's recommendation expressly rejecting Wyoming's contention for a fixed, mass allocation to Nebraska. The Court stated: "We have carefully considered these contentions of Wyoming and have concluded that they do not warrant a departure from the method of allocation proposed by the Special Master."<sup>26</sup>

The decree expressly recognizes some priorities across state lines.<sup>27</sup> For the rest, the decree imposes certain injunctions against Colorado and Wyoming in order to protect downstream equities, establishes certain priorities among federal reservoirs and between senior canals diverting in the pivotal reach and the federal reservoirs, and addresses several water administration issues.<sup>28</sup> While the decree apportions only natural flow waters, it contains some provisions limiting storage in the upper reaches in Colorado and Wyoming and also limiting transbasin diversions by Colorado.<sup>29</sup>

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<sup>26</sup> *Nebraska v. Wyoming*, 325 U.S. at 626-27. See also Doherty Report at 113-14. Special Master Doherty noted (although a mass allocation had been adopted in the apportionment of the Laramie River between Wyoming and Colorado):

[t]hat there is here no such possibility is conceded. The impossibility is strongly emphasized by Nebraska's Exhibit 432, which shows that the priorities on the main river fall into 113 different brackets or categories alternating among the three states and presenting insuperable difficulties to any attempt to make corresponding mass allocation of water. Even though priorities below Tri-State Dam be eliminated, the difficulty would still be prohibitive.

<sup>27</sup> See, e.g., decree Paragraph IV. See also *infra* note 29.

<sup>28</sup> The North Platte River decree, as modified in 1953 by the Glendo stipulation among the parties, is at Appendix C.

<sup>29</sup> For the purposes of the pending petitions to amend the pleadings, significant elements of the decree include the following:

## B. Changed Conditions

The physical history of the river and the new claims for wildlife resulting from federal environmental legislation passed since 1945 provide an important backdrop

### NATURAL FLOW WATERS

- There is a proportionate allocation of the natural flows in the pivotal Guernsey Dam to Tri-State Dam section during the May 1st to September 30th irrigation season—seventy-five percent to Nebraska and twenty-five percent to Wyoming. Decree Paragraph V.
- Nebraska has the right to designate intrastate the share apportioned to the Nebraska State Line Canals for use on the Nebraska lands served by those canals at the state line. Decree Paragraph V.
- The decree establishes certain key interstate priorities. Decree Paragraph IV. The 1945 Court explained that:

The combined storage capacity of the North Platte and Kendrick projects is equal to 175 per cent of the long-time annual average river run-off of the river at Pathfinder. We have here storage capacity in excess of the practicable limits of a dependable supply as that term has hitherto been construed. . . .

. . . [A]ny allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two states. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible.

*Nebraska v. Wyoming*, 325 U.S. at 626-27 (citation omitted).

### STORAGE WATER

- Storage water is not apportioned by the decree and is to be distributed by the owners of storage water rights "in accordance with any lawful contracts." Decree Paragraph VI.
- The decree does not affect the ownership or operation by the United States of the various federal facilities including storage reservoirs and works. Decree Paragraph XII.
- Year around storage limitations are issued against Colorado (decree Paragraph I(b)) and Wyoming. Decree Paragraph II(b).

[Continued]

for understanding the motions to amend the pleadings, especially Count IV of Nebraska's 1994 motion. Alleged structural changes to the river's geomorphology and the

<sup>29</sup> [Continued]

- The decree defines priorities across state lines for the federal reservoirs in Wyoming. Decree Paragraph III. Pursuant to the Reclamation Act, 43 U.S.C. §§ 372, *et seq.*, the federal Bureau of Reclamation operates the North Platte and Kendrick Projects on the river. (See First Interim Report at Appendix A for a detailed explanation of the projects.) All of the federal reservoirs in Wyoming are junior to the senior appropriators of Nebraska lands supplied by the French Canal and by the State Line Canals diverting at and near Tri-State Dam. Decree Paragraph IV.
- Not more than 40,000 acre feet of the natural flow of the stream and its tributaries "which cannot be stored in upstream reservoirs under . . . this decree" may be stored in Glendo Reservoir during a water year in addition to evaporation losses. Decree Paragraph XVII(b).
- Never more than 100,000 acre feet of storage water may be held in Glendo Reservoir at any one time, "including carryover storage," except for flood water or water restored in Glendo Reservoir that was originally stored in Pathfinder Reservoir. Decree Paragraph XVII(b).

#### MUNICIPAL USES

- The decree "shall not affect or restrict the use or diversion of water . . . for ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree Paragraph X. I see the proper interpretation and application of Paragraph X as a particularly vexing issue as did the Court in its 1993 opinion. See *Nebraska v. Wyoming*, 113 S. Ct. at 1699 ("We, too, are troubled by Paragraph X").

#### TRANSBASIN DIVERSION LIMITATION

- Colorado may export no more than 60,000 acre feet of water in any consecutive ten-year period. Decree Paragraph I(c).

#### ADMINISTRATION OF THE DECREE

- Daily flow computations are required. Decree Paragraph V.
- A formula is provided (adopted from a United States exhibit) to measure evaporation and transportation (river carriage)



wildlife claims are urged by some of the parties and *amici* as new conditions for the Court's consideration. Paragraph XIII(f) of the decree specifically provides for reopening the decree for "[a]ny change in conditions making modification of the decree or the granting of further relief necessary." Further, Paragraph XIII(c) of the decree provides that the decree may be reopened to examine questions related to new or proposed new storage capacity on tributaries between Pathfinder Reservoir and Guernsey Reservoir.

The source of the North Platte's headwaters is early summer snow melt above Pathfinder Dam which produces run-off to the stream's main tributaries in Colorado and in Wyoming. Because of Paragraph XIII(c), the decree's provisions concerning tributaries downstream of Pathfinder Dam, the major component of the North Platte Project, are central to this case.<sup>30</sup> The basis for Nebraska's proposed amendments to its pleadings is that "current and

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losses unless Nebraska, Wyoming and the United States agree to a modified formula. Decree Paragraph V.

- Construction of additional gauging stations may be required if necessary at the Wyoming-Nebraska state line. Decree Paragraph VII.
- Accurate recordkeeping is required, which must be available for inspection at all times, of irrigated lands and storage by Colorado and Wyoming and exportation by Colorado respecting the higher river reaches governed by Paragraphs I and II. Decree Paragraph IX.

#### *REOPENER CLAUSE*

- A broad reopener clause "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy," decree Paragraph XIII, including reopening the decree to deal with any change in conditions making further relief necessary. Decree Paragraph XIII(f).

<sup>30</sup> Maps of the North Platte River drainage basin are attached as Appendices A and B.

imminent actions" of Wyoming affecting tributary contributions to the mainstem threaten to "upset the equitable balance of the North Platte River established in the Decree."<sup>31</sup>

Moreover, Nebraska, and the United States and those *amici* representing the wildlife interests have asserted at various times during these proceedings that structural changes have occurred in the river basin that affect wildlife uses in downstream Nebraska. It is reasonable to assume that, at least where the non-irrigation season impacts of the issues already in the case are examined, some evidence of those changes and their impact on the critical habitat will be introduced.

In 1944, Special Master Doherty described the character of the stream thus:

From North Park the North Platte River is a rapidly flowing stream which courses through a relatively narrow valley until it reaches eastern Wyoming, where it gradually broadens out, with accompanying loss of velocity. Proceeding through western and central Nebraska the channel becomes very wide, ranging from 3,000 to more than 6,000 feet. Frequently it divides into small channels separated by sand bars or islands, and in times of low water the stream becomes lost in the deep sands which form its bed. In these stretches it has become familiarly characterized as being "two miles wide and one inch deep."<sup>32</sup>

The physical character of the North Platte River underwent dramatic changes beginning with the federal Bureau

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<sup>31</sup> Nebraska's Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River (Feb. 18, 1994), Count I ¶ 13 (Docket Item No. 623); Appendix D p. D-4.

<sup>32</sup> Doherty Report at 19.

of Reclamation's construction of the large dams in the early part of this century. Some of the parties and *amici* suggest that there have been important additional changes since 1945 that might need to be explored at trial in the context of any relevant issues.

There appear to be several causes contributing to any changes that may have occurred in the Platte basin. Some of them—for example weather patterns<sup>33</sup>—are unrelated to the problems that form the basis for this litigation, but most of them are implicated in the issues being explored. Changes in administration and usage patterns have allegedly affected flows and stream geomorphology. Many such developments or proposed projects are issues in this case. Changes in the way a state administers water under state law can affect the yield of the river,<sup>34</sup> as can the

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<sup>33</sup> Climatic conditions, particularly rainfall and snowfall, affect the shape of the river dramatically. *See, e.g.*, Doherty Report at 7 (“In 1930 began a period of extraordinary drouth [sic] in the entire North Platte and Platte River Valleys which has since continued and which has been accompanied by severe shortages of water throughout the three states. This was undoubtedly one of the main factors in the precipitation of the present litigation.”)

<sup>34</sup> In the original proceedings, Nebraska complained of several Wyoming water administration practices. They were not specifically enjoined by the decree, however, and continue today. For example, Wyoming Statutes prohibit the regulation of water on the river in the absence of a call. Wyo. Water Admin. Memo. at 5-7 (Docket Item No. 565). Nebraska also complained about the practice in Wyoming of allowing irrigation diversions of more than one acre foot per second per seventy acres, a practice that continues since the 1945 decree. Wyoming state law has expanded this practice of excess diversions to include irrigation water rights with priority dates between March 1, 1945 and March 1, 1985. *Id.* at 11. Wyoming also continues not to observe stream-wide priorities and instead administers the stream by sections. *Id.* at 13-18. Further, “[c]onsistent with Wyoming’s practice of not regulating tributaries for the mainstem or imposing any form of regulation without a call, Wyoming had not [before 1945] regulated diversions of junior appropriators for the benefit of Pathfinder.” *Id.* at 18-19. This practice has also continued. *Id.* at 20.

exportation of water out of the North Platte Basin.<sup>35</sup> At trial, it is likely that evidence will be introduced respecting several other factors that may be shown to have affected drainage patterns in the North Platte River basin, including groundwater depletions, changes in usage patterns, changes in the character of irrigation and geomorphic changes.<sup>36</sup> The North Platte River has been intensely managed over the past century, inevitably causing permanent changes to the streambed.

Such changes have allegedly had an impact on wildlife habitat, especially in the Big Bend reach in central Nebraska. Traditionally, there were significant flow variations that served to maintain the character of the stream. The summer saw low flows after spring floodings which "carried a great deal of sediment from the sandy streambed, and carved new, braided river channels."<sup>37</sup> These flow variations served to maintain the wide, shallow, and unvegetated character of the streambed. The annual scouring away of the vegetation was important to maintain the predator-free zones on the river for wildlife protection. It also appears that the river has become a much narrower and deeper channel than it was formerly, with semi-permanent islands and sandbars in its center that are no longer regularly scoured by the annual flooding that used to occur,<sup>38</sup> and that this has also allegedly had a negative impact on wildlife habitat.

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<sup>35</sup> Only Colorado exports water from the North Platte drainage basin and its exportation is limited by the decree to no more than 60,000 acre feet in any ten-year period. See Decree Paragraph I(c).

<sup>36</sup> See generally Richard A. Simms, *et al.*, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mtn. Min. L. Inst. § 23.01, § 23.03, at 23-25 to 23-26 (1988).

<sup>37</sup> Memorandum of Platte River Trust in Support of Motion for Leave to Intervene (Mar. 20, 1987) at 16 (Docket Item No. 7).

<sup>38</sup> See generally Paul J. Currier, *et al.*, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* 93-98, 108-114, 119-120 (1985).

Because several key federal environmental laws had not been enacted at the time of the original proceedings, those statutes and the wildlife uses they recognize may also come before the Court now as changed conditions. The Big Bend reach of the stream in Nebraska is now subject to the operation of several federal statutes such as the Endangered Species Act of 1973<sup>39</sup> and the National Environmental Policy Act of 1969.<sup>40</sup> Indeed, *amicus* The Platte River Whooping Crane Critical Maintenance Trust ("The Platte River Trust") has asserted that the 1945 decree is "not an equitable apportionment because it does not account for the wildlife needs of the habitat."<sup>41</sup>

I suggested in the Second Interim Report that applicable federal laws might result in the Court on occasion "qualify[ing] a state's apportionment with a proviso that the granting of the apportionment does not remove the need to comply with federal environmental laws, or cautioning that the state's apportioned share might have to remain in the stream to the extent instream flows are needed to safeguard environmental values protected by these laws."<sup>42</sup>

From the start, the potential wildlife issues in this case have sharply divided the parties and the *amici*. *Amici* National Audubon Society ("Audubon") and The Platte River Trust have consistently maintained that, although the Supreme Court may not be the ideal forum for the development of wildlife issues, it is the *only* forum that can look at the overall situation rather than at each project, development or license independently and that,

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<sup>39</sup> 16 U.S.C. §§ 1531, *et seq.*

<sup>40</sup> 42 U.S.C. §§ 4321, *et seq.*

<sup>41</sup> July 26, 1994 Transcript at 137 (Ms. Davis for Platte River Trust) (Docket Item No. 688). See Second Interim Report at 6 n.10 (Docket Item No. 463) for the background of The Platte River Trust.

<sup>42</sup> Second Interim Report at 107 n.116 (Docket Item No. 463).



therefore, it alone can ensure that sufficient water is delivered downstream to supply the needs of wildlife.

Colorado and Wyoming, on the other hand, have steadfastly opposed any allocation of water for wildlife needs, or even the introduction of evidence on the instream flows needed to protect wildlife values, insisting that wildlife issues are better served in other forums and through other mechanisms, such as the governors' and the Secretary of the Interior's current wildlife recovery program initiative,<sup>43</sup> and consultation with the federal Fish and Wildlife Service pursuant to the Endangered Species Act, and cooperation between the Environmental Protection Agency and the Army Corps of Engineers under the Clean Water Act.<sup>44</sup>

Nebraska invoked wildlife needs in central Nebraska in both her 1988 and 1991 proposed amendments. Although her motions were denied, Nebraska has persisted in her attempts to have wildlife issues considered in this proceeding in order to protect that equity and to spread the burden of providing water for wildlife habitat.<sup>45</sup>

The United States, viewing the river wearing two different-looking hats—Bureau of Reclamation and Fish and Wildlife Service hats—expresses concern with wildlife issues but steadfastly maintains the view that they are best considered in other forums.<sup>46</sup>

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<sup>43</sup> See *infra* note 72 for a discussion of this program. See also, e.g., Colorado's Response to Nebraska's Motion for Leave To File Amended Petition at 3 (May 2, 1994) (Docket Item No. 645) ("Through [the contemplated recovery] program . . . the parties will be able to accomplish far more than the Court could grant as relief in this proceeding.").

<sup>44</sup> 33 U.S.C. §§ 1251, *et seq.*

<sup>45</sup> For example, Nebraska's current motion to amend the pleadings for an off-irrigation season apportionment keys on wildlife issues.

<sup>46</sup> See, e.g., July 26, 1994 Transcript at 146-47 (Ms. Patricia Weiss for the United States) (Docket Item No. 688):

While I continue to believe that the time has not yet come for a global non-irrigation season apportionment for wildlife habitat and other uses,<sup>47</sup> I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context

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[W]e heard quite a bit of discussion in the earlier arguments on where, oh, where is the United States [on wildlife questions].

Well, it seems to us that we're everywhere. We're in the FERC proceedings protecting . . . the needs of the habitat. We're, of course, the initiators or at least in the middle of the Memorandum of Agreement [among the three governors and the Secretary of the Interior]. . . . We have Section 7 consultations going on all the time on the needs of the endangered species. . . . We have 404 permit proceedings that take into account NEPA studies and also the needs of endangered species. . . .

<sup>47</sup> Nebraska, of course, disagrees and would like the Court pursuant to her proposed Count IV to provide for this equity through an off-irrigation season apportionment. *Amici* The Platte River Trust and Audubon also disagree. Not only do they regard the upstream states' participation in Secretary Babbitt's initiative described above as a delaying tactic rather than a genuine effort, but they urge that "[w]ildlife in Nebraska is in serious trouble," July 26, 1994 Transcript at 109 (Mr. Berle for Audubon) (Docket Item No. 688) and that "we are also in a situation where the cumulative effect has been disastrous for the habitat." July 26, 1994 Transcript at 142 (Ms. Davis for The Platte River Trust) (Docket Item No. 688). These *amici* believe that the problem is sufficiently bad to require an affirmative apportionment for wildlife. The Platte River Trust has suggested that, indeed, the Court should "back up the train" to be fair to wildlife:

We submit that the historic use is not acceptable to wildlife. And that essentially, . . . where [you] . . . seem[] to be leaning is a continued acceptance of the historic use as the existing apportionment of the river.

July 26, 1994 Transcript at 137 (Ms. Davis for The Platte River Trust) (Docket Item No. 688). *Cf. New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Mr. Justice Holmes) ("A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.").

of the controversies over the waters of the Laramie River and Deer Creek. In the meantime, as I indicated in my Second Interim Report, federal environmental statutes remain the law of the land and can be invoked as needed to prevent interference with downstream flows necessary to protect wildlife habitat.<sup>48</sup>

### C. The Current Proceedings

After the Court granted Nebraska leave to file her 1986 petition and Wyoming leave to file her 1987 counterclaim, the case was referred to me<sup>49</sup> essentially containing the following issues: (1) five pending intervention motions; (2) the Inland Lakes issue; (3) tributary issues, including (i) Laramie River issues (Grayrocks and Corn Creek) and (ii) the Deer Creek issue; and (4) Wyoming's counterclaim issues.

#### 1. *Present Status of the 1987 Issues*

##### a. *Intervention Issues*

The intervention motions were denied by the Court in 1993,<sup>50</sup> following the submission of my Second Interim Report. All five would-be intervenors have been accorded active *amicus* status since the start of these proceedings and have participated in briefings, hearings, and status conferences.<sup>51</sup>

The *amici* represent important interests and have added substantial factual information and learning. Indeed, it is contemplated that they may selectively be permitted to introduce evidence at trial to develop certain issues. *Amici* The Platte River Trust and Audubon represent the

<sup>48</sup> Second Interim Report at 107 n.116 (Docket Item No. 463).

<sup>49</sup> *Nebraska v. Wyoming & Colorado*, 483 U.S. 1002 (1987).

<sup>50</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1694.

<sup>51</sup> All of the *amici* have actively participated since then except for the Nebraska Public Power District.



wildlife interests. *Amicus* Basin Electric Power Cooperative ("Basin Electric") operates the coal-fired power project served by the Grayrocks Dam and Reservoir on the Laramie River.<sup>52</sup> *Amici* Nebraska Public Power District and Central Nebraska Public Power and Irrigation District ("Central Nebraska") are downstream water users in Nebraska. Central Nebraska is the owner and operator of Kingsley Dam, which impounds Lake McConaughy in Nebraska, a two million acre foot storage reservoir that has an important impact upon water supplies for many water uses in Nebraska.

b. *The Inland Lakes Issue*

As previously indicated, the Court fully disposed of the Island Lakes issue in its 1993 opinion.<sup>53</sup>

c. *Tributary Issues*

(1) *Laramie River Issues*

The Court in 1993 determined that the Court's 1922 Laramie River decree<sup>54</sup> apportioning the Laramie's flows

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<sup>52</sup> See Second Interim Report at 6 n.10 (Docket Item No. 463). Initially, I recommended denying Basin Electric intervention rights primarily on the ground that its interests would be protected by Wyoming as its *parens patriae*. During the course of these proceedings, it has become apparent that Wyoming and Basin Electric have opposing interests on some key questions, notably the deliveries required to be made downstream all year around under the 1978 Grayrocks Settlement Agreement. It has also become apparent that Nebraska and Basin Electric have certain identities of interest, especially the notion of substantial injury to Nebraska on the Laramie on account of upstream developments. Thus, I have reopened the door for Basin Electric to petition to intervene as a party, but to date it has expressed contentment with its "position as the roving child of various *parens patriae*." July 27, 1994 Transcript at 230 (Mr. Weinberg for Basin Electric) (Docket Item No. 688).

<sup>53</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1696-97. See *supra* note 7.

<sup>54</sup> *Wyoming v. Colorado*, 259 U.S. 419, amended, 260 U.S. 1 (1922), vacated and new decree entered, 353 U.S. 953 (1957).

between Colorado and Wyoming “did not apportion *all* the waters of the Laramie; it dealt only with flows down to and including the Wheatland Project.”<sup>55</sup> The Court further concluded that the 1945 Court “apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach,” and did not “affirmatively apportion Laramie flows to Nebraska.”<sup>56</sup> Thus, the Court in 1945 “did not decide the fate of the excess Laramie waters.”<sup>57</sup>

In light of its Laramie rulings, the Court concluded that Nebraska should come “forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree.”<sup>58</sup> Subsequent to the Court’s 1993 opinion, I directed Nebraska to elaborate on her alleged Laramie injury threats.<sup>59</sup> Nebraska produced a memorandum on that subject,<sup>60</sup> which contained sufficient facts concerning alleged injury to discourage Wyoming from seeking summary judgment on that issue. It is now accepted that this case will go to trial on the question of whether actual and proposed developments on the Laramie pose substantial injury threats to Nebraska.<sup>61</sup>

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<sup>55</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1698.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1699. If Nebraska did not come forward with such evidence, “summary judgment should be entered in favor of Wyoming.” *Id.*

<sup>59</sup> Order of the Special Master (July 15, 1993) (Docket Item No. 555).

<sup>60</sup> Neb. Laramie Memo. (Docket Item No. 591). *See supra* note 14.

<sup>61</sup> *See, e.g.*, United States Response to Nebraska’s Memorandum on the Status of the Laramie River Claims (December 10, 1993) (Docket Item No. 604) (the “described new uses for Laramie River flows . . . have the potential for significantly, perhaps totally,

(2) *The Deer Creek Issue*

In 1993 the Court declined to grant summary judgment in favor of Wyoming that the proposed new storage reservoir on Deer Creek was exempted from the decree's constraints by Paragraph X.<sup>62</sup> That paragraph provides that the decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption."<sup>63</sup> That provision, which was added to the draft decree near the end of the original proceedings, presents difficult interpretive and practical issues. At trial it may or may not be necessary to interpret Paragraph X depending on whether Nebraska can prove substantial injury and on whether Wyoming is able to prove that Deer Creek qualifies as an ordinary and usual municipal use. The parties and *amici* now accept that the Deer Creek issues will proceed to trial.

d. *Counterclaim Issues*

The United States has commented that there appears at this point to be "little, if anything, left" of Wyoming's

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depleting Laramie River inflows to the North Platte River"); see also Basin Electric Cooperative's Response to Nebraska's Memorandum on the Status of the Laramie River Claims (December 9, 1993) at 2 (Docket Item No. 601) ("Nebraska has now made a substantial showing that Wyoming has authorized . . . construction by the Goshen Irrigation District of new diversion works. . . . It is no longer undisputed that Wyoming is 'not currently interfering with' the releases Basin Electric is obligated to maintain from Grayrocks. . . ."). *Id.* at 2 (citing *Nebraska v. Wyoming*, 113 S. Ct. at 1698).

<sup>62</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1692.

<sup>63</sup> *Nebraska v. Wyoming*, 325 U.S. at 670. The Court was "troubled by Paragraph X." *Nebraska v. Wyoming*, 113 S. Ct. at 1699. If literally applied as Wyoming urges, it could have far-reaching and perhaps unintended implications for the decree's apportionment.

1987 counterclaim after the 1993 opinion.<sup>64</sup> As a technical matter, however, the Court did not dispose of it. In addition, as I interpret the 1987 counterclaim and the 1993 opinion, Wyoming may still litigate whether she has been injured by excessive Nebraska upstream calls for the benefit of irrigation diversions below Tri-State Dam that were determined to have no "claim on water originating in Wyoming and Colorado."<sup>65</sup>

Wyoming alleged in her 1987 counterclaim that Nebraska was violating the decree by demanding North Platte flows for diversions by irrigation canals at and above Tri-State Dam in excess of "the present beneficial use requirements of the Nebraska lands entitled to water under the Decree"; by demanding natural flow and storage water from sources above the Tri-State Dam and diverting those waters to unrecognized and unauthorized uses below the Dam; and by using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation.<sup>66</sup>

The Court's 1993 holding respecting those issues, especially the absence of absolute ceilings on canal diversions, appears to have cut away much of the ground underlying the first two elements of the counterclaim. The Court held that Special Master Doherty's calculation of the irrigation requirements of the lands served by the canals in the pivotal reach was undertaken only to determine the "appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually, or cumulatively."<sup>67</sup> If Nebraska is free to allocate her proportion of the natural flows as she sees

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<sup>64</sup> Reply Memorandum for the United States on Motions of Nebraska and Wyoming to File Amended Pleadings (May 16, 1994) at 6 (Docket Item No. 658).

<sup>65</sup> *Nebraska v. Wyoming*, 325 U.S. at 628.

<sup>66</sup> Wyo. 1987 Counterclaim at 8-9 (Docket Item No. 5).

<sup>67</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

fit, then there no longer appears to be any tooth to the Wyoming allegation that Nebraska violates the decree by diverting part of her apportionment below Tri-State, unless calls by Nebraska are shown to be for the benefit of irrigation diversions downstream of Tri-State Dam. Similarly, if, as the Court also held, Paragraph IV of the decree does not limit the absolute quantities of water the canals may divert (but only limits the extent to which Nebraska canals may stop the federal reservoirs in Wyoming from storing pursuant to their junior priorities), then again the irrigation requirements of Nebraska lands served by the apportionment are not, as Wyoming continues to urge, a basis for setting a ceiling on Nebraska's apportionment.<sup>68</sup>

In any event, the counterclaims and cross-claims have raised a factual and legal issue—whether Nebraska canals have made excessive calls—which may be explored as part of Wyoming's defense to Nebraska's claims if not as part of her original counterclaim. To the extent that the Court determines that any surviving aspects of Wyoming's counterclaim implicate concepts of beneficial use and waste, Wyoming has declared that, if she is not permitted to prosecute her proffered new counterclaim and cross-claim on this issue, she will raise this issue as a defense to the claims of Nebraska and the United States.<sup>69</sup>

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<sup>68</sup> See the discussion of Wyoming's beneficial use theories, *infra* note 151.

<sup>69</sup> See July 27, 1994 Transcript at 299-300 (Mr. Cook for Wyoming) (Docket Item No. 688).

Let me also suggest to you that proof of waste will be part of Wyoming's defense of Nebraska's claimed need for new restrictions regarding the Deer Creek or any other depletive use they have now added to their list. . . .

Also, proof of . . . the Bureau of Reclamation's inefficiency and waste will be part of Wyoming's defense to claims that new restrictions are predicated on injury to Nebraska's apportionment of storage.



## 2. The Motions to Amend the Pleadings

Because the many considerations affecting the status of flows and the stream are so complex, the 1945 decree—despite the absence of litigation for over forty years—turns out to have left open as many questions as it has answered. Thus, today, almost eight years after the filing of Nebraska's 1986 petition, and after much learning about the issues, the case comes before the Court on motions to amend the pleadings in some significant respects. The proposed amendments, if granted, have the potential to change the shape of the decree significantly.

### a. *Nebraska's 1988 Proposed Amendment*

In 1988, Nebraska sought to amend her pleadings to modify the decree to require each of the three states to share the burden of providing instream flows necessary to preserve critical wildlife habitat on the North Platte River.<sup>70</sup> The Court denied that motion without opinion.<sup>71</sup> Despite the Court's denial of Nebraska's 1988 petition, wildlife habitat problems continue to present issues that ultimately cannot be ignored in these proceedings.<sup>72</sup>

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<sup>70</sup> Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief (Jan. 11, 1988) (Docket Item No. 47).

<sup>71</sup> *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

<sup>72</sup> Several of the parties and *amici* have urged for my consideration materials in the record showing that, recently, in a similar vein to what Nebraska sought in 1988, the Secretary of the Interior has initiated a process with the governors of the three Platte Basin "to restore fish and wildlife habitat along the central Platte River in Nebraska." See Letter from Daniel P. Beard, Bureau of Reclamation, United States Department of the Interior to Dear Friend, June 16, 1994 attached to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684). So far, this process appears to have resulted only in a general goal stated in a June 10, 1994 Memorandum of Agreement "to initiate the development of a mutually acceptable Platte River Basin Endangered Species Recovery Implementation Program." See Memorandum of Agreement for Central Platte River Basin Endangered Species Recovery Implementation Program, June 10, 1994, attached

*b. Nebraska's 1991 Proposed Amendments*

On October 9, 1991, Nebraska again sought leave to amend her original 1986 petition to state three new claims: Count I sought a global apportionment of the presently unapportioned non-irrigation season natural flows in the pivotal reach; Count II alleged decree violations by Wyoming through the excessive use of natural flow and groundwater for irrigation, depletion of storage water, depletion of return flows and excessive consumption of water on tributaries below Alcova Reservoir; and Count III, for the first time requesting relief against the United States, alleged that the United States was violating the decree by "[c]ontracting for the use of Glendo Reservoir water for other than authorized purposes."<sup>73</sup>

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to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684).

The promise of the project was on the same day undermined by a letter from Colorado Governor Romer to Secretary Babbitt, declaring that Colorado was not obliged by the Memorandum of Agreement "to deliver any more water at the Colorado-Nebraska State line than is provided by interstate compact." See Letter from Roy Romer, Governor of the State of Colorado, to the Honorable Bruce Babbitt, Secretary of the Interior, June 10, 1994, attached to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684).

When questioned about that letter during the Denver hearing, counsel for Colorado responded, "my knowledge is that Governor Romer signed that agreement in good faith. I believe Governor Romer was being just fairly candid and I think the other states, too, are going to . . . be trying to protect apportionments that they have. Wyoming, I'm sure, will." July 26, 1994 Transcript at 87 (Mr. Seigneur for Colorado) (Docket Item No. 688).

<sup>73</sup> Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims and Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 9, 1991) ("Neb. 1991 Proposed

In June, 1993, the Court denied Count I without prejudice and referred Counts II and III to me for my recommendations,<sup>74</sup> and that referral was still pending before me when Nebraska filed her February 1994 proposed amendments.<sup>75</sup>

c. *Nebraska's 1994 Proposed Amendments*

Nebraska's proposed amended pleadings present four claims, several of which have sub-parts.

Count I seeks injunctive relief against Wyoming "to protect and enforce the equitable apportionment and to restrain further violations of the Decree."<sup>76</sup> It reasserts and expands upon Nebraska's 1986 allegations of violations of the decree through proposed construction of tributary storage capacity and tributary development between Pathfinder and Guernsey Reservoirs<sup>77</sup> and specifically challenges Wyoming's proposed Deer Creek Project, and proposed reregulating reservoirs and canal linings in the

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Amendments") (respectively, "Neb. 1991 Motion," "Neb. 1991 Am. Pet.," and "Neb. 1991 Brief in Support of Am. Pet.") (Docket Item No. 407).

<sup>74</sup> *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

<sup>75</sup> Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) ("Neb. 1994 Proposed Amendments") (respectively, "Neb. 1994 Motion," "Neb. 1994 Am. Pet." (Appendix D), and "Neb. 1994 Br. in Support of Am. Pet.") (Docket Item No. 623). See Neb. 1994 Br. in Support of Am. Pet. at 2-3 (Docket Item No. 623) ("To conform its pleadings to the Court's decisions and in the interest of clarity and conciseness, this Amended Petition would replace and supersede Nebraska's Petition [of 1986] and Nebraska's 1991 Amended Petition.").

<sup>76</sup> Neb. 1994 Am. Pet., Count I ¶ 16 (Docket Item No. 623); Appendix D p. D-6.

<sup>77</sup> *Id.* ¶ 11a; Appendix D p. D-4.



Goshen Irrigation District and the Horse Creek Conservancy District.<sup>78</sup>

Count I also reasserts claims presented in the still pending Count II of Nebraska's 1991 Proposed Amendments. Nebraska alleges that Wyoming is violating and threatening to violate the decree by depleting the natural flows of the North Platte by (i) reducing the flow of tributaries entering the stream below the Alcova Reservoir through groundwater development and the depletion of return flows and the construction of reservoirs and (ii) reducing the flow of tributaries and the mainstem as well as canal and lateral flows reaching Nebraska through the same sorts of actions.<sup>79</sup> It also alleges that Wyoming has failed to maintain complete and accurate records of water uses as required by the decree in order to monitor compliance.<sup>80</sup>

Count II requests injunctive relief against the United States for violation of Nebraska's equitable apportionment "by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir."<sup>81</sup>

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<sup>78</sup> *Id.* ¶ 12, Appendix D p. D-5. The Horse Creek tributary enters the stream in Nebraska approximately 5.5 miles downstream of Tri-State Dam.

<sup>79</sup> *Id.* ¶¶ 11b, 11c, and 12; Appendix D p. D-5.

<sup>80</sup> *Id.* ¶ 11d; Appendix D p. D-5.

<sup>81</sup> *Id.* Count II ¶ 4; Appendix D p. D-7. Count III of Nebraska's 1991 Proposed Amendments stated this claim and an additional claim concerning the Bureau's allocation of natural flows among its contractors in water-short years contrary to the decree. Nebraska has withdrawn that second part of her 1991 claim against the United States. *See* Neb. 1994 Br. in Support of Am. Pet. at 3. (Docket Item No. 623). *See also* Letter from Richard Simms for Nebraska to Saône B. Crocker, Assistant to Special Master (Aug. 29, 1994) (Docket Item No. 698).

Count III seeks a Nebraska apportionment of Laramie River flows below Wheatland<sup>82</sup> and injunctive relief preventing Wyoming from "impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement."<sup>83</sup>

Count IV, like the first count of Nebraska's 1991 Proposed Amendment, seeks a global non-irrigation season apportionment due to "changes in conditions" since 1945.<sup>84</sup> Count IV alleges that various Nebraska claims and uses have relied on non-irrigation season flows since 1945, "including irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, including endangered and threatened species."<sup>85</sup> Nebraska also alleges that demand for the natural flows exceeds supply during the non-irrigation season.<sup>86</sup>

In sum, Nebraska's 1994 Proposed Amendments include those claims from her 1986 petition that remain

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<sup>82</sup> Neb. 1994 Am. Pet., Count III ¶ 12 (Docket Item No. 623); Appendix D p. D-12.

<sup>83</sup> *Id.* The 1978 Grayrocks Settlement Agreement resulted from litigation over Basin Electric's then proposed development on the Laramie. It limits Grayrocks' consumption of water and requires Basin Electric to release certain minimum flows all year around to the Laramie's confluence with the North Platte. In my Second Interim Report, I recommended that the Court amend the Paragraph XIII reopener clause to countenance possible relief should Wyoming interfere with Basin Electric's performance of its obligations under the Grayrocks Settlement Agreement. Second Interim Report at 110 (Docket Item No. 463). The Court declined, holding that it already had such authority under subparagraph XIII(f). *Nebraska v. Wyoming*, 113 S. Ct. at 1698.

<sup>84</sup> Neb. 1994 Am. Pet., Count IV ¶ 6 (Docket Item No. 623); Appendix D p. D-13.

<sup>85</sup> *Id.* ¶ 7; Appendix D p. D-13.

<sup>86</sup> *Id.* ¶ 8; Appendix D p. D-13. This was the standard for an exercise of original jurisdiction articulated by the Court in 1945. *Nebraska v. Wyoming*, 325 U.S. at 610.

unresolved following the Court's 1993 opinion, all of the claims in her 1991 Proposed Amendments,<sup>87</sup> and some new requests for relief, notably a Laramie apportionment and specific relief enjoining Wyoming from interfering with the Grayrocks Settlement Agreement, as well as relief related to alleged injury from present and threatened pumping of hydrologically connected groundwater, depletion of return flows and inadequate record-keeping.

d. *Wyoming's 1994 Proposed Amendments*

For the first time, Wyoming seeks to amend her 1987 pleadings by adding several new counterclaims and several cross-claims against the United States.<sup>88</sup>

Wyoming's First Counterclaim and First Cross-Claim seek similar relief against Nebraska and the United States. These new claims seek to modify the decree to confirm that Nebraska cannot

demand direct flow water from Wyoming for use below Tri-State Dam and to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.<sup>89</sup>

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<sup>87</sup> Nebraska has not pleaded one aspect of 1991's Count III, complaining against the United States for allocating natural flows among its Warren Act contractors in water-short years, but has withdrawn that aspect of the count. *See supra* note 81.

<sup>88</sup> Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) ("Wyo. 1994 Proposed Amendments") (respectively, "Wyo. 1994 Motion," "Wyo. 1994 Am. Counterclaims And Cross-Claims" (Appendix E), and "Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims") (Docket Item No. 624).

<sup>89</sup> Wyo. 1994 Am. Counterclaims and Cross-Claims at 6 (Docket Item No. 624); Appendix E p. E-6. *See discussion infra* pp. 55-64.

Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims concern uses of storage water in Glendo Reservoir. Wyoming alleges that Nebraska and the United States have violated the decree by permitting delivery of 8,000 acre feet of storage water from Glendo Reservoir each year to Central Nebraska Public Power and Irrigation District for non-irrigation uses.<sup>90</sup> In the alternative, by her Third Counterclaim and Cross-Claim, Wyoming asks for an amendment to Paragraph XVII of the decree alleging that its terms are "no longer equitable" due to changed conditions.<sup>91</sup> The Third Cross-Claim is asserted against the United States and Colorado, while the Second Cross-Claim is alleged only against the United States.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek to rescind the decree's provisions for determining transportation or carriage losses under Paragraph V "and to leave such determination to state officials under state law."<sup>92</sup> The Fifth Cross-Claim is asserted against Nebraska, Colorado and the United States.

Finally, Wyoming's Fourth Cross-Claim alleges that the United States has not operated the upstream federal reservoirs in Wyoming "in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs."<sup>93</sup> It seeks declaratory and injunctive relief solely against the United States.<sup>94</sup>

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<sup>90</sup> Wyo. 1994 Am. Counterclaims and Cross-claims, Second Counterclaim ¶ 15 (Docket Item No. 624); Appendix E p. E-6. See also *id.*, Second Cross-Claim ¶ 28, Appendix E pp. E-10 to E-11.

<sup>91</sup> *Id.* Third Counterclaim ¶ 16; Appendix E p. E-6. See also *id.*, Third Cross-Claim ¶ 29; Appendix E p. E-11.

<sup>92</sup> *Id.* Fourth Counterclaim ¶¶ 19-24, Appendix E pp. E-7 to E-8; *id.* Fifth Cross-Claim ¶ 33, Appendix E p. E-12.

<sup>93</sup> Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Cross-Claim ¶¶ 30-31 (Docket Item No. 624); Appendix E pp. E-10 to E-11.

<sup>94</sup> *Id.* at 13 (Docket Item No. 624); Appendix E p. E-12.

In sum, Wyoming's proposed counterclaims and cross-claims would replace her 1987 counterclaims, request relief against the United States for the manner in which it has operated federal reservoirs in Wyoming, request relief for the ways in which Nebraska and the United States have managed storage water in Glendo Reservoir and seek to modify the decree for calculating carriage losses.

### III. BASIS FOR AND SUMMARY OF RECOMMENDATIONS

In making my recommendations to the Court on the motions to amend the pleadings, I have used the following principles as my guide.

In 1993 the Court set forth the standards for its jurisdiction in this case and for shaping the scope of this litigation. Noting that "nothing would prevent Nebraska from submitting a new petition if we deemed the original one deficient,"<sup>95</sup> the Court "decline[d] the invitation, at this late date, to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings."<sup>96</sup>

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<sup>95</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1695.

<sup>96</sup> *Id.* The Court also declared the standards for obtaining relief after trial in this proceeding. To *enforce* existing rights in the decree injury need not be shown. A party need show only that alleged conduct, if admitted, violates a right established by the decree. *Id.* The right a party seeks to enforce "need not be stated explicitly in the decree;" if the decree "is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* "[A] higher standard of proof applies" when a state seeks "*modification . . . rather than enforcement.*" *Id.* (emphasis added). When what is sought is essentially "a reweighing of equities and an injunction declaring new rights and responsibilities," a showing of "substantial injury" is required for a party to be entitled to new equitable relief. *Id.* at 1696.



With respect to the jurisdictional test for this particular original case, the Court commented that Paragraph XIII's reopener clause

perhaps eases a plaintiff's burden of establishing, as an initial matter, that a claim falling within its purview is "of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610. . . . After all, a variety of changed conditions may "promise to disturb the delicate balance of the river" created by the decree. *Id.* at 625.<sup>97</sup>

Previously, the 1945 Court articulated a standard for its exercise of original jurisdiction in the case of an over-appropriated stream that remains part of the law of this case:

What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been over appropriated, claims based not only on present uses but on projected additional uses as well. . . . [W]here the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination.

*Nebraska v. Wyoming*, 325 U.S. at 610.

Based on these standards, with only two key exceptions I am recommending that the Court grant leave to file Nebraska's and Wyoming's proposed amendments to the pleadings.

#### **A. Amendments That I Recommend Be Granted**

I recommend that the following Nebraska counts be granted:

- *Count I* (raises both enforcement and modification issues; largely restates and elaborates upon Ne-

<sup>97</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1696.



braska's 1986 pleadings; is based upon changed circumstances that are set forth in some detail and makes allegations that, if supported at trial, suggest substantial injury).

- *Count II* (raises a modification issue respecting Glendo storage that all the parties find appropriate for resolution in the context of this proceeding).
- *Count III* (seeks modification of the decree with respect to Laramie River issues owing to changed conditions, including the changes inhering in the Court's 1993 opinion; in her pleading, and in her Laramie River memorandum, Nebraska makes allegations that, if proved at trial, could cause substantial injury to her apportionment).

I recommend that the following Wyoming counts be granted:

- *Second and Third Counterclaims and Second and Third Cross-Claims* (raise factual issues concerning Glendo storage water suitable for trial in the context of a proceeding enforcing Paragraph XVII of the decree).
- *Fourth Counterclaim and Fifth Cross-Claim* (pray for a modification of the carriage loss formula due to changed conditions).
- *Fourth Cross-Claim* (against the United States alleges unlawful action regarding federal storage water deliveries; also raises factual issues related to enforcement of the decree that are suitable for trial).

#### **B. Amendments That I Recommend Be Denied**

First, I am recommending, that the Court exercise its discretion to deny, without prejudice, Nebraska's petition as to Count IV which seeks a global non-irrigation season apportionment. My recommendation to deny is grounded in several considerations concerning the development of

the case. I believe that the trial on issues already in the case, such as Wyoming's proposed developments on the Laramie River and Deer Creek, will inform any later case that the Court may find justiciable concerning non-irrigation season flows, and that the case before me is sufficiently complex to merit attention before turning to any new non-irrigation apportionment case. This is especially so because Nebraska now concedes she will not be seriously threatened by the prospect of a several-year delay on a non-irrigation season apportionment case. Count IV, therefore, is not ripe at present.

Second, I recommended that the Court deny with limited exceptions, with prejudice, Wyoming's First Counterclaim and First Cross-Claim. These are ultimately based on the premise that Nebraska should have a fixed and defined apportionment akin to a mass apportionment based upon principles of beneficial use. There is no question, however, that the Court intended to allocate available supplies in the pivotal reach proportionately between Nebraska and Wyoming and that it rejected Wyoming's mass allocation proposals as unworkable.<sup>98</sup>

#### **IV. RECOMMENDED DISPOSITION OF NEBRASKA'S PROPOSED AMENDMENTS TO THE PLEADINGS**

##### **A. Count I**

I recommend that the Court grant the first count of Nebraska's motion to amend her pleadings. Count I, is in large measure, a restatement and elaboration of Nebraska's main injury claim "to account for the changed circumstances" since the case was filed in 1986.<sup>99</sup> If the Court permits this amendment, it will replace Nebraska's 1986 pleadings and her 1991 proposed amended plead-

<sup>98</sup> See *supra* pp. 9-10 & n.26 and *infra* pp. 56-57.

<sup>99</sup> Nebraska 1994 Proposed Amendments; Neb. 1994 Br. in Support of Am. Pet. at 15 (Docket Item No. 623).

ings. This count will then embody the core of Nebraska's case.

After reciting the basic elements of her 1986 claim and recounting circumstances that have changed in the more than seven plus ensuing years, most notably the issuance of the Court's 1993 opinion, Nebraska complains that Wyoming presently is violating and threatening to violate Nebraska's equitable apportionment by depleting the natural flows of the North Platte River through:

- a. The proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
- b. Reducing the flow of tributaries entering the North Platte River below Alcova by means of groundwater development, the depletion of return flows, and the construction of reservoirs;
- c. Reducing the flow of tributaries and the mainstem in Wyoming, as well as canal and lateral flows reaching Nebraska, by the present and future effects of existing groundwater development and by potential groundwater development for municipal, industrial, and irrigation purposes which would result from favorable action on pending applications to appropriate; and
- d. Failing to maintain complete and accurate records of water uses set forth in the decree as is necessary to monitor compliance with the decree.<sup>100</sup>

Initially, both Wyoming and the United States objected to Nebraska's proposal to include a groundwater pumping claim.<sup>101</sup> Upon further consideration, the United

<sup>100</sup> Nebraska 1994 Am. Pet. at 4-5 (Docket Item No. 623).

<sup>101</sup> See Memorandum for the United States on Motions of Nebraska and Wyoming to File Amended Pleadings (May 2, 1994) ("U.S. May 2, 1994 Memo.") at 2-5 (Docket Item No. 646).

States changed its position and now agrees that Nebraska should have the opportunity to prove injury from present and prospective Wyoming groundwater pumping.<sup>102</sup>

In addition to objecting to Nebraska's attempt to raise the groundwater pumping issue, Wyoming and the United States object to Nebraska's request for specific relief with respect to proposed Wyoming actions that are alleged to threaten depletions of flows of Horse Creek, a tributary of the North Platte River that flows through southeastern Wyoming and enters the mainstem in Nebraska below the pivotal reach, a few miles downstream of Tri-State Dam.

### ***1. Groundwater Pumping Issues***

Wyoming concedes that groundwater and surface waters are connected and further admits that groundwater pumping in Wyoming can and does in fact deplete surface water flows in the North Platte River. Further, Wyoming concedes that water taken by groundwater pumping and used solely in Wyoming is not counted as part of the supply in the pivotal reach that is divided seventy-five percent, twenty-five percent by the decree. Despite these admissions of critical physical facts, Wyoming takes the position that Nebraska's groundwater claims "FAIL IN BOTH LAW AND EQUITY."<sup>103</sup>

Wyoming argues, first, that Nebraska has no basis in law to assert a groundwater claim because the decree did not limit the use of groundwater in any of the three states but apportioned only surface waters. Wyoming points to the Court's refusal in 1945 to consider groundwater pumping in discrete contexts of the decree. She notes that the Court declined to consider groundwater resources

<sup>102</sup> Supplemental Memorandum of the United States on Proposed Amended Claims of Wyoming and Nebraska (July 1, 1994) at 5-6 (Docket Item No. 675).

<sup>103</sup> Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (May 2, 1994) ("Wyoming 1994 Response") at 29-31 (Docket Item No. 651).

available in Nebraska to meet Nebraska users' water requirements and also did not reduce surface water requirements of the Interstate Canal by the available groundwater supplies Nebraska irrigators used to supplement surface diversions.<sup>104</sup>

Wyoming's legal position is flawed in two respects. First, learning and experience since 1945 teaches that the physical facts that she admits are critical when viewed against the clear modern trend in water law to take account of the connection between groundwaters and surface waters. Water law scholars have noted and endorsed the shift to "conjunctive use" of surface waters and groundwaters.<sup>105</sup>

Nebraska and the United States have presented affidavits of experts showing that groundwater pumping in Wyoming sections of the North Platte Basin, both present and threatened, has the potential to deplete significantly the surface flows that are subject to the decree's seventy-five percent, twenty-five percent split. The showing made thus far warrants granting the parties the opportunity to present their case on the impacts of Wyoming groundwater pumping.

<sup>104</sup> *Id.* at 30.

<sup>105</sup> See, e.g., Joseph L. Sax, *et al.*, *Legal Controls of Water Resources* 464 (2d ed. 1991) (citation omitted).

Given the hydrogeologic fact that much groundwater and surface water is linked, governing law should take cognizance of their relationship. . . . [T]he separation of groundwater law from surface water led to the possibility, or even the probability, that hydrologically interconnected waters would be subject to inconsistent legal claims. Courts muddled through, making rules adequate to decide cases, but lacking in overall coherence. Over time, the need for integrated legal governance and management of groundwater and surface water has been acknowledged and has been labelled "conjunctive water use." The term has been defined as "the name applied to several different practices and processes employed to coordinate the use of ground and surface waters in order to get the maximum economic benefit from both resources."

Second, invoking equitable principles, Wyoming asserts that "Nebraska cannot overcome the legal obstacle presented by the fact that Nebraska's own law does not recognize the very injury of which Nebraska complains."<sup>106</sup> Claiming that Nebraska has long been the only western state with virtually no statutory or common law acknowledging the physical interrelationships between surface and groundwater, Wyoming argues that Nebraska's benighted approach is such that she cannot expect the Court to impose groundwater restrictions on other states "as a matter of interstate apportionment."<sup>107</sup>

Nebraska provides a sufficient answer to Wyoming's equitable argument by noting that Wyoming "forgets that it is the upstream state which is subject to decreed restrictions designed to protect the natural flows of the North Platte River in the reach above the state line."<sup>108</sup> At oral argument Nebraska amplified by asking rhetorically, "whether or not ground water in Nebraska is . . . depleting surface flows owed to another state."<sup>109</sup>

Because Wyoming acknowledges that her groundwater pumping has impacts on flows in the pivotal reach, and

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<sup>106</sup> Wyoming 1994 Response at 29 (Docket Item No. 651).

<sup>107</sup> *Id.* at 31.

<sup>108</sup> Nebraska's Reply to Wyoming's, Colorado's and the United States' Responses to Nebraska's Motion for Leave to File an Amended Petition (May 16, 1994) at 9 ("Neb. 1994 Reply to Responses") (Docket Item No. 659).

<sup>109</sup> July 26, 1994 Transcript at 12 (Mr. Simms for Nebraska) (Docket Item No. 688).

I do not intend to suggest that Wyoming can in no circumstances make out a claim or defense based on groundwater pumping practices in Nebraska if they can be shown to have an effect on the water apportioned by the decree. For example, during oral argument Nebraska counsel alluded to a possible issue whether groundwater diversions within Nebraska might increase "the frequency of demand or the quantity of demand of natural flow and storage water."

*Id.* at 12-13.



because there is no legal or equitable basis to exclude evidence respecting injury to Nebraska, Nebraska should have the opportunity to present her injury case at trial respecting present and threatened Wyoming groundwater pumping.

## 2. *Horse Creek Issue*

Wyoming objects strenuously and the United States objects less strenuously to Nebraska's request for a trial to secure injunctions barring Wyoming depletions of Horse Creek, a south bank tributary of the North Platte River that arises in southeastern Wyoming and flows first east and then north before entering the North Platte River in Nebraska approximately 5.4 miles downstream of the Wyoming-Nebraska state line and approximately 3 miles below the Tri-State Dam. The United States' objection voices both a general concern for a sparing exercise of the Court's original jurisdiction and a concern about injecting claims over depletions stemming from "conservation of water to avoid waste, a practice which would appear praiseworthy." Thus, the United States counsels against adding Nebraska's Horse Creek claims to this case absent a Nebraska showing of substantial injury.<sup>110</sup>

Wyoming's objections to the Horse Creek claim are more specific and focused. She argues, first, that the Court's 1993 opinion rejecting Nebraska's claim to an apportionment of Laramie River flows applies *a fortiori* because Horse Creek enters the mainstem downstream of the apportioned Guernsey to Tri-State section. Second, Wyoming contends that a Nebraska request for an apportionment of Horse Creek does not present a case or controversy worthy of the Court's original jurisdiction because Nebraska fails to show how she could be injured by any proposed Wyoming actions on Horse Creek. Wyoming's no-injury argument is grounded in the fact that Horse Creek enters the North Platte River below the ap-

<sup>110</sup> U.S. May 2, 1994 Memo. at 10 (Docket Item No. 646).

portioned reach, that the stream's historical contribution to the mainstem has allegedly been negligible, and that the impacts of Wyoming's proposed re-regulating reservoir and captures of return flows are expected to be small. Wyoming further suggests that the adjudication of Nebraska's claims to Horse Creek would require a separate original action that the Court should accept only if Nebraska can make the requisite showing of need for a Horse Creek apportionment.<sup>111</sup>

Although, according to the Court's standards outlined above,<sup>112</sup> Nebraska is not required to show injury to get into court, the objections of both Wyoming and the United States are in any event largely answered by the showing that Nebraska has made concerning Horse Creek's contribution to the natural flows in the pivotal reach. Nebraska has produced evidence from the original proceedings showing Horse Creek's then substantial average annual contributions of 21,900 acre feet of water annually to the North Platte during the irrigation season and 13,900 acre feet during the non-irrigation season.<sup>113</sup> Nebraska has also alleged proposed actions of Wyoming that threaten to deplete those contributions.

The United States is, of course, correct that water conservation measures are generally praiseworthy, but an important predicate to the decree was the assumed continuation of return flows of the sort provided by Horse Creek to meet the needs of Nebraska irrigators diverting from the mainstem downstream of Tri-State Dam. In its 1945 opinion, the Court agreed with Special Master Doherty's conclusion that the Tri-State Dam to Bridgeport section of the river in Nebraska should be excluded from the apportionment for irrigation purposes "on the grounds that its canals are adequately supplied from return

<sup>111</sup> Wyoming 1994 Response at 24-28 (Docket Item No. 651).

<sup>112</sup> See *supra* pp. 33-34.

<sup>113</sup> Neb. 1994 Reply to Responses at 21-22 (Docket Item No. 659).

flows and other local sources.”<sup>114</sup> Because return flows from streams such as Horse Creek furnished the predicate for limiting Nebraska’s apportionment to the canals diverting at and above Tri-State Dam, Nebraska should have the opportunity to present evidence of significant depletions of those return flows. Stated another way, if Wyoming were allowed with impunity to deplete flows that were a predicate for the geographic limits of Nebraska’s apportionment, Nebraska could argue persuasively that the geographic limits of her apportionment should be extended to the river sections downstream of Tri-State Dam.

Thus, Nebraska should have the opportunity to show that she will suffer substantial injury from Wyoming’s proposed Horse Creek developments or, for that matter, from Wyoming actions threatening depletions of significant sources of supply flowing out of Wyoming and entering the North Platte below Tri-State Dam.<sup>115</sup>

## B. Count II

I also recommend that the Court grant the second count of Nebraska’s motion to amend her pleadings. This count alleges violations of the decree by the United States in contracting for the use of Glendo Reservoir storage water in a manner contrary to the stipulated amendment entered in 1953 in anticipation of the reservoir’s construction.<sup>116</sup> Nebraska also claims that the United States is violating and threatening to violate Nebraska’s decreed rights by contracting for Wyoming uses

<sup>114</sup> *Nebraska v. Wyoming*, 325 U.S. at 654-55.

<sup>115</sup> *Cf. Nebraska v. Wyoming*, 113 S. Ct. at 1698-99 (Nebraska should come “forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree”) (emphasis added).

<sup>116</sup> *See Nebraska v. Wyoming*, 345 U.S. 981 (1953); the stipulated amendment is incorporated into the modified decree at Appendix C.

of Glendo storage water other than for authorized purposes in the basin of the North Platte in southeastern Wyoming below Guernsey Reservoir.

While denying that its Glendo contracting violates the 1953 decree amendment, the United States does not object to adding Count II because it agrees that all parties would benefit from a modification of the Glendo decree provisions. There seems to be a consensus among those concerned that the relevant provisions of the decree should be amended, and there is some prospect that the issue raised in Count II may be resolved by stipulation. If the Count II issues are not so resolved, they are appropriate for addition to the case.<sup>117</sup>

### C. Count III

I recommend that the Court grant the third count of Nebraska's motion to amend her pleadings. By Count III Nebraska seeks to amend her claims respecting the Laramie River in light of the Court's 1993 opinion.<sup>118</sup> Count III prays that the Court (i) specify that the inflows of the Laramie below Wheatland are part of the natural flows in the pivotal Guernsey to Tri-State reach of the North Platte apportioned seventy-five percent to Nebraska and twenty-five percent to Wyoming, (ii) enjoin Wyoming from depleting Nebraska's equitable share of the Laramie's contribution to the North Platte, and (iii) enjoin Wyoming from impeding or interfering with releases from Basin Electric's Grayrocks Dam and Reservoir pursuant to the 1978 Grayrocks Settlement Agreement.

The justiciability of Count III is supported by the United States and *amici* Audubon and Basin Electric and

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<sup>117</sup> Wyoming's proposed Second Counterclaim and Second Cross-Claim or, in the alternative, Third Counterclaim and Third Cross-Claim also implicate Glendo issues. As indicated below, I also recommend that the Court grant those proposed amendments.

<sup>118</sup> See discussion *supra* pp. 21-22.

is opposed by Wyoming, essentially on the ground that Nebraska seeks an equitable apportionment of a river that "lies wholly within the states of Wyoming and Colorado."<sup>119</sup>

In 1993 the Court contemplated that Nebraska should have the opportunity to show injury from actions and threatened actions interfering with Laramie River contributions to the North Platte which were counted in the original apportionment and upon which Nebraska has relied.<sup>120</sup> Should Nebraska make the requisite injury showing, she may establish an entitlement to relief although, as a technical matter, I agree with Wyoming that such relief should not take the form of an affirmative Nebraska apportionment of Laramie natural flows. The equitable apportionment doctrine has been employed to apportion interstate water bodies, and it should not be contorted to grant a state an "apportionment" of waters of a stream lying wholly outside that state's boundaries.<sup>121</sup>

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<sup>119</sup> Wyoming 1994 Response at 33 (Docket Item No. 651).

<sup>120</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1698-99; see also discussion *supra* pp. 21-22. The Laramie is the largest contributor of natural flows entering the mainstem in the critical reach.

<sup>121</sup> For a lucid articulation of this issue, see Basin Electric Power Cooperative's Memorandum in Response to Motions for Leave to Amend Pleadings (Apr. 29, 1994) at 4 n.4 (Docket Item No. 642).

Reference is sometimes made to "apportioning" the water of the Laramie below the Wheatland Project between Wyoming and Nebraska. See *Nebr. Amend. Pet. 1*; *Nebr. Br. 17* (Feb. 18, 1994). Basin submits that, technically, the water of the Laramie cannot be "apportioned" between Wyoming and Nebraska because the Laramie does not extend into Nebraska and is a tributary of a river, the North Platte, the water of which is apportioned among Colorado, Wyoming and Nebraska. To the extent that Nebraska's claims of injury by Wyoming's actions on the Laramie are sustained, Nebraska's rights to have water of the Laramie below Wheatland flow into the North Platte should be secured by appropriate injunction against Wyoming,



As a practical matter, however, there would not appear to be any difference between injunctive relief granted Nebraska against Wyoming's developments on the Laramie and an apportionment of Laramie flows below Wheatland for the benefit of Nebraska. Counsel for Wyoming addressed this question during the July 26, 1994, Denver hearing when pressed to acknowledge the purely semantic character of the debate. Asked whether there was a practical distinction in the relief that could be afforded Nebraska, counsel responded:

It would if the new apportionment were used as a vehicle to explore the needs of the Laramie River to meet downstream issues, wildlife issues that have heretofore been denied Nebraska in this case.

. . . . .

. . . I see the Laramie River issue as I see the Deer Creek or the contributions of ground water. Something that is impacting the flows in the North Platte that may ultimately be divided 75-25 between Nebraska and Wyoming. We don't see it as something separate and unique from beyond that.<sup>122</sup>

Thus Wyoming, through reasoning that is not transparent, fears that a Nebraska "apportionment" of Laramie water could create Nebraska rights that are somehow greater than could be afforded through injunctive relief.

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not by undertaking to "apportion" such water in the proper sense of that term.

*See also* Reply Memorandum for the United States (May 16, 1994) at 4 n.3 (Docket Item No. 658) (the United States agrees with Wyoming and Basin Electric "that technically Nebraska cannot request apportionment of a stream that does not flow into Nebraska." Nonetheless the United States concurs with Basin that "whatever it is called, the factual inquiry in determining whether Wyoming should be enjoined from further development of the Laramie is the same.").

<sup>122</sup> July 26, 1994 Transcript at 51-52 (Mr. Cook for Wyoming) (Docket Item No. 688). *See also* Wyoming 1994 Response at 32-34 (Docket Item No. 651).



The Court's 1993 opinion provides no support for the distinction Wyoming would draw between the scope of relief potentially available via apportionment on the one hand or injunctions on the other. While it is too early to forecast what relief will be appropriate or, indeed, whether Nebraska will offer proof of injury that will entitle her to any relief at all, it is not too early to disagree with Wyoming's suggestion that there is an alchemy that limits the Court's injunctive powers in a way that renders those powers incapable of achieving the same results as an equitable apportionment.<sup>123</sup>

#### D. Count IV

For lack of ripeness, I recommend that the Court exercise its discretion to deny, without prejudice, the fourth count of Nebraska's petition which seeks an equitable apportionment of non-irrigation season natural flows of the North Platte River.

The petition to add Count IV to the pleadings is supported by *amici* Audubon and The Platte River Trust and is opposed by Wyoming, Colorado, and the United States and by *amici* Basin Electric and Central Nebraska.<sup>124</sup>

As previously explained, the 1945 decree equitably apportioned the natural flows of the North Platte River in the pivotal Guernsey to Tri-State reach *only* during the

<sup>123</sup> Perhaps Wyoming's real fear is that non-irrigation season injury will be fair game in the Laramie trial, and, of course, it will. The 1978 Grayrocks Settlement Agreement explicitly assures year-round Laramie releases to the North Platte, and, as indicated in the discussion of Nebraska's Count IV, *infra* pp. 50-51, proof of injury from diminished non-irrigation season flows into Nebraska will be part of the Laramie trial.

<sup>124</sup> In opposing Nebraska's Count IV, Central Nebraska strays from the camp of its *parens patriae*, Nebraska, for the first time, agreeing with the United States that Count IV is not yet ripe. See July 26, 1994 Transcript at 126-27 (Mr. Hultman for Central Nebraska) (Docket Item No. 688).

five-month irrigation season between May 1st and September 30th. By her Count IV, Nebraska now seeks to take the next step and obtain an apportionment of the heretofore unapportioned non-irrigation season flows.

In 1988, the Court denied without opinion a Nebraska petition to amend the decree to add an apportionment of instream flows for wildlife during the irrigation season.<sup>125</sup> In 1991, Nebraska again petitioned to amend and for the first time asked for an apportionment of non-irrigation season flows for various uses in Nebraska including wildlife habitat uses.

I recommended that Nebraska's 1991 amendment be denied on ripeness grounds and suggested that the discrete issues then in the case be resolved before adding the complex allocation and administration issues that would necessarily be presented in fashioning a global non-irrigation season apportionment. I allowed, however, that "[t]he time will likely come when a year around apportionment will be needed."<sup>126</sup> Within a week after the Court issued its April 1993 opinion it entered an order denying Nebraska's 1991 motion.<sup>127</sup>

Nebraska's submission of Count IV on February 18, 1994, is a renewal of the same motion made in 1991 for a non-irrigation season apportionment. Nebraska urges that new factual development through formal discovery subsequent to the denial of her 1991 motion calls for granting the 1994 motion. Nebraska points to "numerous water development projects" in various stages of development or consideration by the Wyoming Water Development Commission, a Wyoming state agency funded and charged to develop the state's water resources. Nebraska

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<sup>125</sup> *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

<sup>126</sup> Letter from Special Master Owen Olpin to Justice White (Apr. 9, 1992) at 6 (Docket Item No. 464).

<sup>127</sup> *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

argues that the sheer number of possible Wyoming projects identified through discovery renders her "apprehension . . . well-founded."<sup>128</sup> Apart from the Laramie River and Deer Creek projects already in the case, however, Nebraska makes no allegations that any of the enumerated projects will actually be implemented or concerning the magnitude of the threat to North Platte depletions were they to be implemented. In short, Nebraska has made no meaningful showing of changed circumstances since the Court denied her previous amendment on April 26, 1993.

The Court recently expressed its reluctance to revisit a prior decision respecting its original jurisdiction absent a showing of "any change of circumstance, whether of fact or law."<sup>129</sup> The Court declined to reconsider its previous decision accepting Wyoming's filing against Oklahoma which challenged the constitutionality of Oklahoma's legislative attempt to reduce out-of-state coal shipments into the state. The minimal showing Nebraska has made since the Court's April 26, 1993 denial of her 1991 motion fits within the doctrine of the *Wyoming v. Oklahoma* case.

Moreover, the examination during trial of concrete non-irrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the non-irrigation season. And, as Nebraska's counsel finally conceded during the recent Denver hearing, the near-term threat to her interests from projects other than those "is probably not much."<sup>130</sup> There does not appear to be, therefore, great urgency at this time to revisit the Court's denial of Nebraska's previous

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<sup>128</sup> Neb. 1994 Br. In Support of Am. Pet. at 28 (Docket Item No. 623).

<sup>129</sup> *Wyoming v. Oklahoma*, 112 S. Ct. 789, 796 (1992).

<sup>130</sup> July 26, 1994 Transcript at 157 (Mr. Simms for Nebraska) (Docket Item No. 688).

petition and to broaden this case to litigate an apportionment case for wildlife or non-irrigation season flows.<sup>131</sup>

With respect to the Laramie, Nebraska has already identified three issues with the potential for near-term significant impacts on year around flows. First, the Grayrocks Settlement Agreement requires Basin Electric to deliver minimum flows downstream to the North Platte mainstem throughout the year. Wyoming, not a party to the 1978 agreement, does not concede that the settlement constrains her water users.<sup>132</sup> The case on the Laramie

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<sup>131</sup> The Court has more than once validated the concept of ripeness as a prerequisite to assertion of jurisdiction in original cases. In *California v. Texas*, 437 U.S. 601 (1978), the Court denied *per curiam* a motion by California to file a bill of complaint against Texas. The bill asked the Court to settle a dispute over which state had the power to collect death taxes from Howard Hughes. Justice Stewart concurred stating that the denial was due to lack of ripeness of California's claims. The basic problem, according to the concurrence, was that there was no way to be certain whether California would suffer any injury (*i.e.*, whether Mr. Hughes's estate would have insufficient resources to pay California taxes). Justice Stewart noted that even though the "risk of conflict" between the states might have been sufficient for an assertion of jurisdiction by the federal district court, "that risk certainly does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another"—and hence was insufficiently ripe for review by the Court. *Id.* at 614.

Another original jurisdiction case suggests the same rationale, although it did not explicitly mention the ripeness concept. In *New York v. New Jersey*, 256 U.S. 296, 309 (1921), the Supreme Court refused to assert jurisdiction over New York's request for an injunction barring New Jersey from further discharges of raw sewage into the Upper Bay. The evidence introduced by New York in support of its claims was found "much too meager and indefinite" to support an assertion of jurisdiction. Importantly, however, the Court decreed that the bill be denied without prejudice so that, if New York's proofs of injury were further buttressed at a later date, New York could petition again for relief (in essence the same resolution as proposed herein).

<sup>132</sup> See Wyo. Water Admin. Memo. at 61-62 (Docket Item No. 565).

Wyoming has consistently stated that its water officials are bound by Wyoming law to administer Grayrocks Reservoir in

would examine whether Wyoming should be enjoined from actions that impede or interfere with Basin Electric's guaranteed deliveries in all twelve months. In addition, the proposed Corn Creek and Goshen Irrigation District projects on the Laramie will be examined for their potential to cause year around injury to Nebraska.<sup>133</sup>

In a like manner, Wyoming's proposed storage project on the Deer Creek tributary entering the North Platte between Pathfinder and Guernsey Reservoirs also implicates Nebraska's claims of substantial injury during both the irrigation and non-irrigation seasons. In 1993, the Court resolved an important non-irrigation season issue that is connected to the Deer Creek project<sup>134</sup> when it confirmed a 1904 North Platte Project priority for the storage of 46,000 acre feet annually in the Inland Lakes in Nebraska during the non-irrigation season months of October, November, and April. The remaining Deer Creek issues in the case will also be tried without limiting the evidence to impacts or injury solely during the irrigation season.

Nebraska herself finally conceded that the Laramie, Deer Creek, and other issues that will be addressed in these proceedings abate the urgency of apportioning non-

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accordance with its water rights permits and to administer the Laramie River both above and below Grayrocks Reservoir among the various priorities entitled thereto under Wyoming law. . . . Basin Electric entered into the Grayrocks Settlement Agreement in full recognition of Wyoming law. . . .

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. . . In these matters, Basin Electric will be treated like any other appropriator under Wyoming law.

<sup>133</sup> Those claims would be tried in conjunction with Nebraska's Count III if the Court follows my recommendation to grant it.

<sup>134</sup> Because the Interstate Canal, which delivers water to the Inland Lakes is downstream of Deer Creek, depletion of the non-irrigation season flows of Deer Creek could adversely affect Inland Lakes storage.



irrigation season flows. When pressed during the Denver hearing to provide more specifics and to comment on the likely consequences of a hypothetical three-year delay in litigating the non-irrigation season flows, counsel for Nebraska responded:

I think the answer to that question, given your tentative decision [to address the non-irrigation season impacts of the Laramie and Deer Creek issues] . . . is probably not much. . . .

. . . But when Count IV was redone . . . we did not know that you would take the view that the non-irrigation season ramifications of the other elements of the case that are either already in the case or may get placed in the case [would be addressed at trial]. . . .<sup>135</sup>

Despite Nebraska's failure to show meaningful change in circumstances since the Court's denial of her most recent amendment, fairness requires that I acknowledge the strong contrary argument made in support of the Court's granting Count IV. In my letter to Justice White in which I recommended denial of the previous amendment, I noted the convincing showing that Nebraska had made at that time respecting the importance of non-irrigation season flows and that Nebraska's proffered pleading arguably met the standard for justiciability adopted by the Court in this case in 1945. Nebraska then as now alleged that the claims to the water during the non-irrigation season exceed the supply, thus bringing her pleading within the Court's 1945 ruling that "[W]here the claims to the water of a river exceed the supply, a controversy exists appropriate for judicial resolution."<sup>136</sup> She then as now alleged substantial injury to various

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<sup>135</sup> July 26, 1994 Transcript at 157-58 (Mr. Simms for Nebraska) (Docket Item No. 688).

<sup>136</sup> *Nebraska v. Wyoming*, 325 U.S. at 610.



interests in the state. The 1945 opinion certainly affords a ready rationale for the Court to grant Count IV and afford Nebraska the opportunity to present her evidence on whether the North Platte is overappropriated during the non-irrigation season.

The environmental *amici* strongly support Nebraska's motion and argue persuasively for the outcome supported by the Court's 1945 jurisdictional ruling. They argue that there is need for an overall framework for evaluation of each upstream project in lieu of examining them one at a time. That end can be achieved, it is urged, by apportioning the non-irrigation flows and, in that context, establishing what flows are needed overall to protect wildlife habitat and other Nebraska equities. The Court would thus determine what amounts of water the upstream states must contribute downstream to serve those equities and issue appropriate injunctions.

Looking at these issues purely on a case-by-case basis, the argument continues, only allows the effects of one development, one project or one threatened injury to be reviewed. That approach affords no opportunity to measure overall needs as well as supplies for wildlife habitat and other downstream uses in Nebraska because those needs were not established in 1945 and have not been established since.<sup>137</sup>

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<sup>137</sup> See *supra* pp. 16-20. Apparently, much of the data evidencing necessary flows for wildlife has already been developed. See July 27, 1994 Transcript at 269 (Ms. Davis for the Platte River Trust) (Docket Item No. 688).

And I think that as apocalyptic [sic] as the State of Wyoming tried to paint the complexities and perhaps some of the delays that might occur [if wildlife issues are in this case], I think that there has been quite a bit of data that has already been generated on instream flows and habitat needs through the FERC proceeding and through the work of National Audubon and Platte and others, as well as the states.

See also July 27, 1994 Transcript at 273-74 ("We would hope that you would see this as a matter, if necessary, of crystallization

As indicated at the outset of this Report, the Court could well accept this contrary argument respecting Count IV and grant Nebraska's petition based on the record that is presently before it without the need to invite exceptions. The argument has considerable merit and the Court could well be persuaded by it even though I ultimately was not.

The Court has always exercised its original jurisdiction sparingly and has reserved "substantial discretion" to accept or reject cases proffered to it.<sup>138</sup> In this instance I urge the Court to exercise its discretion to deny Count IV for the reasons set forth above as well as the following reasons.

First, and most important, if the non-irrigation season flows are ever to be apportioned, that apportionment case would be informed—and perhaps even the need for it obviated—by the current proceedings. As I already intend to examine the non-irrigation season impacts of the proposed Wyoming actions that will be tried, there is the prospect for valuable teachings in aid of a future apportionment or forging of interstate accommodations to avoid the need for a further judicial apportionment.

Second, apportioning the non-irrigation season flows will be an entirely new and extremely complex original jurisdiction case. As a practical matter, and given the acknowledged lack of urgency for the non-irrigation season case, there is already a long and complex task still

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[rather than ripeness] because we think the facts are there.") (Mr. Berle for Audubon) (Docket Item No. 688).

<sup>138</sup> *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). In the *Texas* case, the Court exercised its discretion to take jurisdiction. The Court stated, "In recent years, we have consistently interpreted 28 U.S.C. § 1251 (a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Id.*

ahead as the case is presently postured even though almost eight years have passed since Nebraska filed her 1986 petition. To add Count IV would surely bring about further delay and complexity.

## V. RECOMMENDED DISPOSITION OF WYOMING'S PROPOSED AMENDMENTS TO THE PLEADINGS

### A. First Counterclaim and First Cross-Claim

I recommend that the Court deny Wyoming's motion to add her proposed First Counterclaim and First Cross-Claim except in some specific respects discussed below.

Wyoming's First Counterclaim against Nebraska essentially seeks to transform the 1945 equitable apportionment in the pivotal reach from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard.<sup>139</sup> This would amount to much more than a modified decree; it would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion. Similarly, Wyoming's proposed First Cross-Claim against the United States is premised on imposing new beneficial use limitations on Nebraska's apportionment.

Nebraska, the United States and *amici* Central Nebraska, Audubon, and The Platte River Trust all oppose Wyoming's First Counterclaim and First Cross-Claim.

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<sup>139</sup> Wyoming makes no mention of modifying Nebraska's seventy-five percent share of the natural flows in the pivotal reach of the North Platte. It would seem to follow, therefore, that what Wyoming actually seeks is a decree modification that would give Nebraska seventy-five percent of the natural flows or a quantity of water limited by a beneficial use standard, whichever is less. Any water exceeding either ceiling would presumably be solely Wyoming's.

### 1. *Restructuring of the Decree*

Wyoming defends her proposed amendments as a quest for "a clearer definition of Nebraska's apportionment"<sup>140</sup> so that Wyoming will not continue to face uncertainty and costly litigation threats whenever Wyoming water users "propose some change of use or new development in the North Platte basin."<sup>141</sup> That quest for certainty is, in actuality, a plea for restructuring the decree in ways that were considered and expressly rejected in the original proceedings. Further, if the relief requested by Wyoming were to be granted, there would necessarily be an intrusion by the Court into Nebraska's intrastate water administration far beyond what the Court was willing to consider in 1945.

The decree that Special Master Doherty recommended and that the Court entered in 1945 expressly rejected Wyoming's proposal at the time for a mass allocation to Nebraska of a defined annual quantity of water:

Wyoming argues for a mass allocation, e.g. 705,000 acre feet to be allocated to Nebraska for diversion in this section during the irrigation season for Nebraska lands. The Special Master rejected that method. He concluded that it was based on an assumption of dependability of flow which would be bound to result in injustice to one or other of the States. . . . We repeat that the inadequacy of the

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<sup>140</sup> Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims at 6 (Docket Item No. 624).

<sup>141</sup> *Id.* When asked at oral argument whether Wyoming seeks freedom to use everything except that which might be defined as the Nebraska apportionment and then subtracted from the total flows, counsel for Wyoming responded, "That's the very heart of it. It may not be a specific amount that applies year to year. It may depend on meteorological conditions, snow packs. But that goes to our proof and our evidence. . . ." (July 27, 1994 Transcript at 258-59 (Mr. Cook for Wyoming) (Docket Item No. 688)).

supply is too clear to permit adoption of Wyoming's formula.<sup>142</sup>

Wyoming is forthright in stating that she does, indeed, seek a decree modification despite her steadfast position at the start of these proceedings that this case was accepted by the Court only to *enforce* and not to *modify* the decree. Wyoming's position quite understandably changed when the Court confirmed that the scope of this case is not confined to enforcement and countenances possible modifications if the Court's substantial injury test is met.<sup>143</sup>

## ***2. Relationship of Proposed Amended Counterclaim and Cross-Claim to Wyoming's 1987 Counterclaim***

Wyoming protests that her proposed First Counterclaim and First Cross-Claim ought readily to be granted "[b]ecause there is no substantive change in the [1987] counterclaim that would enlarge the Court's jurisdiction or the scope of relief sought."<sup>144</sup> She goes even further in claiming that she simply seeks to modify the existing decree through the imposition of new injunctions that could just as well have been recommended and adopted "if Wyoming proved its existing counterclaim."<sup>145</sup> I agree with Nebraska and the United States that Wyoming's position in this regard is unconvincing.

The wording of the existing Wyoming counterclaim, which the Court granted leave to file in 1987, gave no signal that Wyoming would seek to reopen the apportionment formula. In the counterclaim, Wyoming simply claimed that Nebraska is violating the decree by "demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use

<sup>142</sup> *Nebraska v. Wyoming*, 325 U.S. at 642. See also *supra* pp. 9-10 & n.26.

<sup>143</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1696.

<sup>144</sup> Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims at 14 (Docket Item No. 624).

<sup>145</sup> *Id.* at 13-14.



requirements of the Nebraska lands entitled to water from those canals under the Decree" and "by demanding natural flow and storage water from sources above Tri-State Dam and bypassing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree."<sup>146</sup> That claim is entirely consistent with a straightforward argument, probably intended at the time, that Nebraska should not be able to block Wyoming's proposed upstream water projects if Wyoming can demonstrate unjustified waste of water supplies that could meet Nebraska users' needs.

Similarly, the Wyoming claim that Nebraska is demanding water and "by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized"<sup>147</sup> gave no signal that Wyoming wished to relitigate the apportionment formula. That language, in the context of the decree, suggests only that Wyoming wished to prevent Nebraska from circumventing the geographic limits the Court imposed on Nebraska's apportionment, that is preventing Nebraska from making upstream calls for the benefit of Nebraska irrigation diversions downstream of Tri-State Dam.

Indeed, during the original proceedings, the United States expressed concern over possible circumvention, and the Court responded, "If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree."<sup>148</sup> Reading the Wyoming 1987 Counterclaim in that context, Nebraska and the United States would likely have obtained no inkling that the counterclaim did any more than accept the Court's invitation to

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<sup>146</sup> Wyo. 1987 Counterclaim at 8-9 (Docket Item No. 5).

<sup>147</sup> *Id.*

<sup>148</sup> *Nebraska v. Wyoming*, 325 U.S. at 628-29.



address a claimed circumvention of the decree's geographic limits.<sup>149</sup>

<sup>149</sup> Against this backdrop, Nebraska has expressed outrage at Wyoming's assertion that the proposed amended First Counterclaim adds nothing to the Wyoming 1987 Counterclaim and that Wyoming believed it would be able to offer the same proof and secure the same relief regardless of whether its present petition for leave were to be granted.

At oral argument, Nebraska's counsel complained of having been snookered:

Wyoming now explains for the first time this morning that the initial first counterclaim was broader. That it encompassed . . . a theory of beneficial use based on modern standards.

. . . .

Back in late 1986 [sic. 1987], Wyoming knew full well that it could not present a counterclaim to the Court in the first instance that sought to fundamentally change the apportionment that was accomplished in 1945 after 15 years of proceedings. . . .

Consequently, Wyoming couched its initial counterclaim in ambiguous language and hoped that Nebraska wouldn't thoroughly discern what was going on.

July 27, 1994 Transcript at 310-12 (Mr. Simms for Nebraska) (Docket Item No. 688).

Earlier in the day counsel for Wyoming had protested:

[L]et me assure you, as silly as we are, we prepared for our counterclaims and we have a great investment in evidence that we find will be revealing to you and so we have marched mightily along for this last six and a half years since our counterclaims were accepted or nearly seven with the notion that we were going to have a trial on that and we have prepared to have a trial on that.

And the disappointment would be that somehow, by your actions on Cross-claim—or Counterclaim One, that you would not only deny that amended counterclaim, but somehow, that would preclude us proceeding even on our initial counterclaim. And that is disturbing.

July 27, 1994 Transcript at 259 (Mr. Cook for Wyoming) (Docket Item No. 688).

If Nebraska's suspicions are well-founded, there is little reason to give much credence to Wyoming's protestations that she has

### 3. *The Court's 1993 Opinion*

The Court in 1993 also addressed the nature of Nebraska's apportionment. Wyoming had claimed that the decree imposed absolute ceilings on diversions by individual canals in the pivotal reach and that Nebraska was barred from requesting diversions in excess of the "irrigation requirements" calculated by Special Master Doherty and relied upon by the Court in framing the decree. Responding to Wyoming's contention, the Court in 1993 concluded:

But the requirements were calculated for the purpose of determining the appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually or cumulatively. See Doherty Report 161 . . . Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit. See 325 U.S., at 667.<sup>150</sup>

This holding and its rationale substantially undercut Wyoming's proposed First Counterclaim and First Cross-Claim. Wyoming in fact is now proposing to have the Court do exactly what Doherty and the Court expressly determined not to do, that is to elevate Doherty's calculation of *requirements*<sup>151</sup> to an absolute ceiling on Ne-

devoted great effort to preparing for the trial of her beneficial use limitation thesis.

<sup>150</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

<sup>151</sup> The decree adopted the proportionate allocation or flat percentage method based upon Special Master Doherty's calculations of the dependable supply from 1931-1940. *Nebraska v. Wyoming*, 325 U.S. at 626. Although the words "beneficial use" appear in both Special Master Doherty's Report and in the original opinion, they are not tied to defined standards in the decree. There are no criteria for nor definitions of waste or beneficial use in either the Report or the decree. Special Master Doherty did, however, devote considerable energy to addressing historic diversions. See, e.g., Doherty Report at 76-79 and 247-252. He concluded "that an ap-

braska's apportionment. While the holding in 1993 only answered the narrow question whether there were diversion limits on a canal-by-canal basis, Wyoming does not now dispute that presently there is no defined ceiling to Nebraska's apportionment and that Wyoming is asking the Court to modify the decree and impose a ceiling for the first time.

Wyoming attempts to deal with the 1993 holding by arguing that the Court acknowledged "the continuing dispute over the extent to which Paragraph IV limits the call of the Nebraska State Line Canals against the federal reservoirs."<sup>152</sup> The dispute over Paragraph IV that the 1993 opinion left open, however, does not support the granting of Wyoming's First Counterclaim and First Cross-Claim. In responding to Wyoming's request for a ruling that the federal reservoirs have no obligation to bypass natural flow to a senior canal making excessive calls, the Court simply declined to make a ruling at that time, "[b]ecause there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls."<sup>153</sup> The possibility of proof of viola-

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portionment now made should be based *primarily* upon the conditions of water supply which have prevailed since 1930." *Id.* at 10 (emphasis added). This disturbed Justice Roberts. In dissenting, he stated, "[T]he Court now undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective uses of an interstate stream on the basis of past use." *Nebraska v. Wyoming*, 325 U.S. at 657 (Roberts, J., dissenting). Justice Roberts noted further that some of the natural flows "went to waste in the area [the Special Master] considered critical." *Id.* at 663. Thus, the dissent certainly assumed that proportionate allocation was the basis for the decree, and that it was not grounded in the concept of beneficial use. To the extent that Special Master Doherty quantified historic uses, he apparently did so to gain a sense of what the ratio for allocation should be.

<sup>152</sup> Wyo. 1994 First Counterclaim ¶ 10 (Docket Item No. 624); Appendix E pp. E-3 to E-4.

<sup>153</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

tion of Paragraph IV priorities, of course, remains open, but proving such violations would not establish beneficial use limits on the canals "either individually or cumulatively."<sup>154</sup>

#### 4. *Practical and Policy Considerations*

Practical and policy considerations also counsel against imposing mass allocation, beneficial use, or kindred ceilings on Nebraska's apportionment.

First, the Nebraska lands served by diversions in the pivotal reach (or, for that matter, Wyoming lands served by those same canals) do not by any means receive all the water they need solely from the apportioned natural flows. As Special Master Doherty's report makes clear, fully half and even more of the annual water needs of these lands is frequently supplied by storage water which is not allocated by the decree. Thus to allocate natural flows on a "beneficial use" basis would necessarily require a consideration of more than the amount of the natural flows that would be needed for crop production on Nebraska's lands. It would be necessary to factor in widely varying storage water supplies, meteorological conditions, and doubtless other imponderables as well.

Second, any limitation based on beneficial uses would require far-reaching Court policing of water rights administration within Nebraska to ensure that Nebraska's diversions did not exceed the beneficial use limitations, an exercise that is totally at odds with the holding of the Court in 1993 that Paragraph V of the decree gives Nebraska freedom to allocate water among canals as she sees fit.<sup>155</sup>

<sup>154</sup> *Id.*

<sup>155</sup> *Nebraska v. Wyoming*, 113 S. Ct. at 1701. The 1945 Court was also concerned about intruding on intra-state water administration. Commenting on a proposal by the United States and Nebraska for allocating "blocks" of water on a priority basis, the Court observed that the proposal had the virtue of preserving "the

Third, any defined ceiling grounded solely in beneficial irrigation use requirements, as Wyoming proposes, would take no account of the non-irrigation water uses that are served by Nebraska's share of North Platte waters, including domestic, municipal, and industrial uses and wildlife habitat needs.<sup>166</sup>

5. *Remaining Elements of the Proposed Amended First Counterclaim and First Cross-Claim*

While I recommend denial of Wyoming's First Counterclaim and the First Cross-Claim insofar as they amount to a request to relitigate the apportionment formula, that denial should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments, including issues such as the following.

First, Wyoming (and indeed Colorado and the United States) should have the opportunity to litigate whether Nebraska has circumvented the decree by unlawfully calling for upstream flows for the use of irrigators diverting below Tri-State contrary to the geographic limitation in the 1945 apportionment.<sup>167</sup>

Second, Wyoming should be allowed to defend against relevant Nebraska claims seeking to constrain Wyoming's

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full control of each State over the internal administration of her water supply." *Nebraska v. Wyoming*, 325 U.S. at 644. The flat percentage method the Court ultimately adopted had that same virtue.

<sup>166</sup> Wyoming contests Nebraska's petition for a non-irrigation season apportionment arguing that "the Court has not accepted any claims to relitigate matters that were previously determined." Wyo. 1944 Br. in Support of Am. Counterclaims and Cross-Claims at 3 (Docket Item No. 624). That principle has no clearer application than to Wyoming's own attempt to relitigate the allocation formula for the decree's apportionment of natural flows in the pivotal reach.

<sup>167</sup> *Nebraska v. Wyoming*, 325 U.S. at 628-29.



upstream uses by introducing evidence of Nebraska's waste of water supplies which, if they were not wasted, might obviate the need for Nebraska's upstream calls. This defensive use of evidence of waste is, of course, quite different from affirmatively fixing Nebraska's overall apportionment by summing beneficial use requirements of the various Nebraska canals as Wyoming proposes.<sup>158</sup>

Third, Wyoming should be entitled to offer evidence of violations of Paragraph IV of the decree via excess Nebraska canal calls or natural flow bypasses by the United States in contravention of the priorities established in Paragraph IV of the decree.

The foregoing enumeration is not intended to be exhaustive and does not foreclose the possibility of Wyoming pursuing other issues within the First Counterclaim and First Cross-Claim that do not amount to an attempt to relitigate the basic apportionment formula that was settled in 1945.

#### B. Wyoming Second and Third Counterclaims and Wyoming Second and Third Cross-Claims

I recommend that the Court grant Wyoming's Second and Third Counterclaims and her Second and Third Cross-Claims. Wyoming's Second Counterclaim against Nebraska and Second Cross-Claim against the United States allege violations of Paragraph XVII of the decree

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<sup>158</sup> On this point I disagree with the apparent thrust of an argument made by counsel for Nebraska at the Denver hearing. Against the prospect that Wyoming might attempt to present such defensive evidence, Nebraska's counsel stated: "[I]n answer to that, I think the Court's ruling on whether or not the first counterclaim is let in in the first place will control *in limine* anything that happens in that regard later on." July 27, 1994 Transcript at 313 (Mr. Simms for Nebraska) (Docket Item No. 688).

Without prejudging any ruling that might be required on objections to evidence, the denial of the First Counterclaim would not necessarily bar Wyoming from introducing evidence of waste in all circumstances of the case.



which governs Glendo Reservoir storage water deliveries and uses. Wyoming claims that both Nebraska and the United States have violated the decree through water deliveries "for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements."<sup>150</sup> Wyoming seeks injunctions against further such violations.

In the alternative, Wyoming's Third Counterclaim and Third Cross-Claim seek an amendment of Paragraph XVII on the ground that Wyoming and Nebraska have been unable fully to use their respective shares of Glendo storage water under the constraints that the decree presently imposes. Accordingly, Wyoming asks for a modification to remove the decree's restrictions on the place and manner of use of water stored in Glendo.

No objections have been raised to these counterclaims and cross-claims. At the present time, the prospect of settling this issue is high as all parties seem to agree that the Glendo storage water delivery restrictions have outlived their usefulness. The granting of Wyoming's petition will enable the trial of this issue to proceed if there is no settlement.

#### **C. Wyoming Fourth Counterclaim and Wyoming Fifth Cross-Claim**

I recommend that the Court grant Wyoming's petition with respect to her Fourth Counterclaim against Nebraska and Fifth Cross-Claim against the United States.

Wyoming complains that the procedure for determining transportation or "carriage" losses adopted in Paragraph V of the decree is no longer factually accurate or equitable and prays that the Court amend Paragraph V "to remove the provisions for determination of carriage losses and to leave such determination to state officials under

<sup>150</sup> Wyo. 1994 Am. Counterclaims and Cross-Claims, Second Counterclaim ¶ 15 (Docket Item No. 624); Appendix E p. E-6.

state law.”<sup>160</sup> Determining transportation losses is a matter of importance under the decree because it is key to dividing storage waters which are not apportioned by the decree from natural flow waters which are apportioned.

Nebraska does not dispute that the issue of transportation losses is justiciable under the Court’s original jurisdiction and would not oppose Wyoming’s Fourth Counterclaim “if Wyoming sought a judicial resolution of the issue.” Nebraska does, however, object to the relief for which Wyoming prays which would leave the determination of transportation losses to the Wyoming State Engineer, “an agency of one of the interested parties.”<sup>161</sup>

Nebraska’s concern about turning transportation loss determinations over to the Wyoming State Engineer goes to the appropriate relief to be granted *if* Wyoming’s evidence establishes a case for modifying the transportation loss formula. The Court’s granting of Wyoming’s petition, however, would certainly not foreordain the relief to be granted. Accordingly, if Wyoming makes the case for changing the transportation loss calculation procedure, all the parties should be heard on how such losses should be determined in the future.

The United States differs from Nebraska in arguing that it is premature for the Court to take jurisdiction of the transportation loss issue absent “an adequate development of the facts . . . to demonstrate [a] case or controversy.” The United States advises of ongoing negotiations in which the parties are attempting to reach agreement on this matter.<sup>162</sup>

<sup>160</sup> Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Counterclaim at 9 (Docket Item No. 624); Appendix E p. E-8.

<sup>161</sup> Nebraska’s Response to Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (May 2, 1994) at 22 (“Neb. 1994 Response to Wyo. Motion for Leave to File”) (Docket Item No. 650).

<sup>162</sup> U.S. May 2, 1994 Memo. at 16-18 (Docket Item No. 646).

I find Nebraska's position more persuasive than that of the United States as I agree that Wyoming has presented a justiciable controversy. It seems more efficient to bring this controversy into the case now so that Wyoming will not be required to petition the Court again if the issue is not resolved in the ongoing negotiations.<sup>163</sup> I have urged the parties to persevere in attempting to resolve this issue on its technical merits, but it is an appropriate issue for resolution in these proceedings if it is not resolved consensually.

#### D. Wyoming Fourth Cross-Claim

I recommend that the Court grant Wyoming's Fourth Cross-Claim against the United States.

Wyoming's Fourth Cross-Claim states a claim solely against the United States for alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs. More specifically Wyoming alleges:

[T]he United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary

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<sup>163</sup> The United States also contends that under Paragraph V of the decree the carriage loss problem Wyoming raises is already addressed by language vesting authority in the Bureau of Reclamation to determine time intervals for passage of water from point to point from day to day in the absence of agreement on that matter among Nebraska, Wyoming, and the United States. *Id.* at 17. There are at least two responses to that. First, the United States does not provide assurance that the issues presently under discussion among the parties are confined merely to the time intervals for passage of water from point to point, the only issue on which the decree empowers the Bureau of Reclamation to act in the event of an *impasse*. Second, the vesting of sole authority in the United States on any transportation loss issue is subject to the same objections that Nebraska raises about leaving the sole determination of a transport loss formula to the Wyoming State Engineer.

to the provisions of the Decree and contrary to the equitable apportionment, (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under the project" and (e) exceeds the limitations in the contracts under the Warren Act.<sup>164</sup>

Wyoming asks for injunctions against future violations of law and a declaration requiring the United States to comply with the terms of its contracts.<sup>165</sup>

The United States and Nebraska oppose Wyoming's Fourth Cross-Claim, while *amicus* Basin Electric supports it. The opposition is grounded on essentially two arguments. First, the United States and Nebraska contend that the claimed violations of law and contracts should not be drawn into this case because storage water was omitted from the decree's apportionment. Second, they contend that the federal compliance issue is already before another forum, the Wyoming federal district court in *Goshen Irrigation District v. United States*, No. C89-0161-J, and that the issue, therefore, should be left for resolution by the federal district court.<sup>166</sup> These argu-

<sup>164</sup> Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Cross-Claim ¶ 31 (Docket Item No. 624); Appendix E p. E-11.

<sup>165</sup> *Id.* at 13; Appendix E p. E-12.

<sup>166</sup> Nebraska asserts a third argument that can summarily be dismissed. She perceives that the real Wyoming agenda is to restrict Nebraska's use of storage water so that any "saved" water can be stored upstream for possible use in Wyoming. Thus, Nebraska complains that the net effect would be less water for Nebraska and more water for Wyoming. That the consequence of the United States' improper conduct, if proved, allows Nebraska to use more storage water than she should under the decree ought to result in more water for Wyoming.

ments will be addressed in turn.<sup>167</sup>

### 1. *Storage Water Not Apportioned*

While the decree did not apportion storage water among the three states, Wyoming correctly points out that the availability of storage water from federal reservoirs was part of the calculus for the final equitable apportionment of natural flows under the decree. Special Master Doherty made the point in his report to the Court:

[I]n an equitable distribution of natural flow between States, where the ultimate question is the State's share, and the rights of individual appropriators are taken into account only for their bearing on the larger right of the State, storage water available to the appropriators of each State may be considered in determining the State's equitable share of the natural flow.<sup>168</sup>

Even more to the point, Special Master Doherty observed that, because storage water was disposed of under the North Platte Project and Warren Act contracts, "the obli-

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<sup>167</sup> U.S. May 2, 1994 Memo. at 18-26 (Docket Item No. 646); Neb. 1994 Response to Wyo. Motion for Leave to File at 23-26 (Docket Item No. 650); Reply Memorandum for the United States (May 16, 1994) at 7-8 (Docket Item No. 658).

<sup>168</sup> Doherty Report at 156. The 1945 Court agreed with Special Master Doherty on this issue:

As we have said, storage water, though not apportioned, may be taken into account in determining each State's equitable share of the natural flow. . . . Our problem involves . . . an appraisal of the equities between the claimants whom Wyoming represents on the one hand and those represented by Nebraska on the other. We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section [the Guernsey to Tri-State reach] compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master.

*Nebraska v. Wyoming*, 325 U.S. at 645 (citation omitted).



gation and necessity of performance of these contracts must be recognized by the decree." <sup>169</sup>

Thus, even though the decree did not apportion storage water, it was framed based in part on assumptions about storage water rights and deliveries, and, therefore, Wyoming should have the opportunity to go forward with her claims that the United States has violated the law and contracts rights and that such violations have the effect of undermining Wyoming's apportionment.<sup>170</sup> It should not be assumed that any relief to which Wyoming might be entitled would interfere with the United States' ownership and operation of the federal reservoirs.<sup>171</sup>

## 2. Availability of Alternative Forum

The second ground urged against Wyoming's Fourth Cross-Claim is that the proper forum for resolving controversies involving federal contracts is the federal district court. The United States, citing the pendency of the *Goshen Irrigation District* case, is particularly insistent that "[i]t is inappropriate to invoke the original jurisdic-

<sup>169</sup> *Id.* at 69.

<sup>170</sup> In this respect, Wyoming's position is not unlike Nebraska's position in attempting to prevent depletions of Horse Creek flows into the mainstem below Tri-State Dam. In that instance Nebraska argues that the continuation of return flows below Tri-State Dam was a predicate for Nebraska's apportionment being limited to reaches of the North Platte upriver from the dam. In a like vein, Wyoming argues that a predicate for the apportionment she received under the decree was an assumed delivery of storage water by the United States in accordance with law and United States compliance with the North Platte Project and with the Warren Act contracts.

<sup>171</sup> The Court in 1945 assumed that the decree would not "interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow." *Nebraska v. Wyoming*, 325 U.S. at 630.



tion of this Court to consider the issue already presented to the federal district court." <sup>172</sup>

This second ground is unpersuasive when account is taken of the *Goshen Irrigation District* case. Most important, neither Wyoming nor Nebraska are parties to the case, and the federal district court, therefore, does not have jurisdiction to consider whether any violations that may be proven on the part of the United States will have the effect of undermining the 1945 apportionment decree. The situation is comparable to the Court's previous taking of jurisdiction over the Inland Lakes issue even though at the time of Nebraska's initial petition in 1986 a case was pending in Wyoming federal district court in which the Wyoming State Engineer was attempting to litigate the same question against the Bureau of Reclamation. <sup>173</sup>

Respectfully submitted,

OWEN OLPIN  
Special Master

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<sup>172</sup> U.S. May 2, 1994 Memo. at 25-26 (Docket Item No. 646).

<sup>173</sup> Further, Basin Electric attacks the United States' opposition to the Fourth Cross-Claim by noting that there is a pending United States motion to dismiss *Goshen Irrigation District* on sovereign immunity grounds after four years of litigation and after submission of the case to the court for decision. Basin Electric observes:

[W]hile urging this Court not to take jurisdiction because the issue is pending in the federal district court, the government is seeking to defeat that court's jurisdiction. The advice of an earlier attorney general, "Watch what we do, not what we say," if heeded here, discloses that the government's objection is substantially duplicitous and unworthy of credence.

Basin Electric Power Cooperative's Memorandum Replying to Responses to Motion for Leave to Amend Pleadings (May 13, 1994) at 6 (Docket Item No. 655).

